(24,054)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1914.

## No. 361.

INTERSTATE AMUSEMENT COMPANY, PLAINTIFF IN ERROR,

*vs.*

W. S. ALBERT, FLETCH CATRON, AND TENNESSEE REALTY AND LEASING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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*Transcript.*

Chancery Court of Hamilton County.

No. 13637.

Parties.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

Solicitors: W. E. Drummond, W. B. Miller.
Sophia Albert, surety.
Filed September 6, 1913. S. E. Cleage, Clerk.

1 At a regular term of the Chancery Court of Hamilton County, Tennessee, begun and held at the Court House in the City of Chattanooga, said County and State, on the 1st Monday, it being the 2nd day of June, 1913, present and presiding the Hon. T. M. McConnell, Chancellor in and for the Third Chancery Division of said state, the following proceedings were had, viz:

*Style of Suit.*

No. 13637.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

*Prosecution Bond. Filed 5th February,* 1913.

We acknowledge ourselves complainant's surety for costs incident to the foregoing suit. This February 4, 1913.

W. E. DRUMMOND,
W. B. MILLER.

2 *Original Bill. Filed 5th February,* 1913.

INTERSTATE AMUSEMENT COMPANY, a Corporation, with Its Situs in Chicago, Ill., Complainant,

vs.

W. S. ALBERT and FLETCH CATRON, Citizens of Hamilton County, Tennessee, and Tennessee Realty & Leasing Co., a Corporation, with Situs in said County, Defendants.

To the Honorable T. M. McConnell, Chancellor, etc., holding the Chancery Court at Chattanooga, Tennessee:

Complainant respectfully shows to the Court that defendants Catron and Albert were formerly partners, doing business under the name of Catron & Albert, and as such became indebted to it the sum of $1554. as shown by certified statement of defendant Albert hereto attached, marked Exhibit No. 1, and made part hereof but not for copy. It will be noted that at the bottom of said statement appears a certification in these words:

"We certify that the above is correct according to the amounts due to date. Catron & Albert, by W. S. Albert."

Said certification was made about February 14, 1912, and complainant received said statement and certification in due course of mail thereafter.

Complainant therefore charges that the defendants Catron & Albert are indebted to it as — her Exhibit hereto, $1554. with interest since February 14. 1912.

Some months ago, complainant is advised a business difference arose between said Catron and Albert, and litigation yet pending resulted.

Sometime later, complainant sent its representative to Chattanooga to collect its indebtedness, and after his arrival one of complainant's legal representatives had a conference with defendant Albert and his attorney.

In this conference, it developed that there would be payable to said Albert from defendant Tennessee Realty & Leasing Co. several hundred dollars in excess of the amount necessary to liquidate

3 complainant's indebtedness. This amount, the Tennessee Realty & Leasing Co. was willing to pay on the order of said Albert, and complainant's representative desired that said Albert direct payment of its indebtedness from the amount thus owing him.

The said Albert and his attorney, on the other hand, desired an opportunity to communicate with complainant's management and ask a reduction of complainant's demand. They did not claim that said Albert was entitled to any legal off set against complainant's demand, but represented, in view of the fact that defendant Albert was or might be called on to meet a large amount of unpaid debts owing by the firm of Catron & Albert more than half thereof they felt defendant Albert might obtain an individual release from complainant on paying only a portion of complainant's indebtedness.

Accordingly, it was agreed between complainants' counsel, on the one hand, and defendant Albert and his counsel, on the other, that Tennessee Realty & Leasing Co. should be directed to withhold at least $1554. of the moneys in its hands until defendant Albert had opportunity to appeal to complainant's management for a reduction as above. And in case of his failure, complainant's demand, as it understood believes and charges, was to be paid from the funds held by Tennessee Realty & Leasing Co. And it was most positively agreed that said funds were not to be paid over to defendant Albert without the consent of complainant.

Complainant charges that by the arrangement aforesaid it acquired a first & prior lien on the funds so held, and that Tennessee Realty & Leasing Co. assented to the arrangement shown, — has for several weeks held the funds aforesaid subject primarily to the discharge of complainant's indebtedness, the balance (if any) above complainant's debt to be paid to defendant Albert or *in* his order. Very recently, the defendant Albert, through his counsel, notified complainant's solicitor that said Albert had been unable to obtain a reduction from complainant, and therefore he now proposed to litigate with complainant its indebtedness aforesaid *said* and "to beat the claim if he could" as he expresed it.

Complainant was surprised shortly thereafter to learn that defendant Albert, Notwithstanding the previous agreement,
4 assented to by three parties in interest, had asked the Tennessee Realty & Leasing Co. to pay over to him, without complainant's assent, the entire funds left on deposit with said corporation, but which its Manager refused to do.

Tennessee Realty & Leasing Co. is without interest in the matter simply holding the funds in question as a courtesy to and by consent of complainant and defendant Albert. Complainant is informed and charges that said Corporation is willing to pay said funds into Court in discharge of its liability in the premises or to otherwise comply with such decree as your Honor may make that will absolve and discharge it from further liability to either of the parties.

The amount left in the hands of Tennessee Realty & Leasing Co. originally was estimated sufficient to cover complainant's indebtedness, and it was then willing to accept the same without interest. But it is advised that it is entitled to recover interest and further that the amount now due, held by Tennessee Realty & Leading Co. is probably not sufficient to cover the principal of its indebtedness, with interest and costs. But is further advised that Tennessee Realty & Leasing Co. will, within 12 months or earlies, owe defendant Albert further moneys and amply sufficient to more than cover any excess of complainant's claim, interest and cost, above the amount now due in the hands of said holding Corporation.

The premises seen, complainant prays that the parties named as such in the caption hereof be made defendants hereto by process returnable to the earliest rule day and be required to answer, but the individuals are relieved from answering under oath.

Let defendant Realty & Leasing Co. be decreed to pay into Court such moneys as are in its hands that are now due and any others

that may hereafter become due defendant Albert, to the extent that is necessary to satisfy any decree which complainant may obtain against said Albert herein, with cost, and let such payment be decreed a discharge of Tennessee Realty & Leasing Co. in the premises.

Let complainant have decree against the individual defendants for the amount of its indebtedness, interest and costs of this suit and if said decree is otherwise unsatisfied, let an execution issue for any unsatisfied balance.

5 Grant general relief.

W. E. DRUMMOND,
W. B. MILLER,
*Solicitors.*

EXHIBIT No. 1.

Catron & Albert, Managers, Airdome Theatre, Chattanooga, Tenn.

To Interstate Amusement Company, Dr.

To booking commissions and office service for weeks of:

| | | |
|---|---|---|
| January | 15th, 1911 | $40.50 |
| " | 23rd, 1911 | 37.25 |
| " | 30th, 1911 | 35.50 |
| February | 6th, 1911 | 32.50 |
| " | 13th, 1911 | 32.75 |
| " | 20th, 1911 | 33.75 |
| " | 27th, 1911 | 40.00 |
| March | 6th, 1911 | 25.25 |
| " | 13th, 1911 | 31.25 |
| " | 20th, 1911 | 31.50 |
| " | 27th, 1911 | 34.00 |
| April | 3rd, 1911 | 30.00 |
| " | 10th, 1911 | 26.75 |
| " | 16th, 1911 | 28.00 |
| " | 23rd, 1911 | 20.00 |
| " | 30th, 1911 | 34.25 |
| May | 7th, 1911 | 26.00 |
| " | 14th, 1911 | 29.25 |
| " | 21st, 1911 | 26.50 |
| " | 28th, 1911 | 28.75 |
| June | 4th, 1911 | 26.50 |
| " | 12th, 1911 | 28.50 |

6

| | | |
|---|---|---|
| June | 18th, 1911 | 25.50 |
| " | 25th, 1911 | 25.25 |
| July | 2nd, 1911 | 26.25 |
| " | 9th, 1911 | 23.00 |
| " | 16th, 1911 | 63.25 |

| | | | |
|---|---|---|---|
| " | 23rd, 1911 | 22.00 | |
| " | 30th, 1911 | 24.25 | |
| Aug. | 6th, 1911 | 18.25 | |
| " | 13th, 1911 | 24.25 | |
| " | 21st, 1911 | 19.00 | |
| " | 28th, 1911 | 45.25 | |
| Sept. | 3rd, 1911 | 35.25 | |
| " | 10th, 1911 | 36.50 | |
| " | 17th, 1911 | 36.50 | |
| Oct. | 8th, 1911 | 38.75 | |
| " | 15th, 1911 | 37.50 | |
| " | 22nd, 1911 | 34.75 | |
| " | 29th, 1911 | 35.50 | |
| Nov. | 5th, 1911 | 37.75 | |
| " | 12th, 1911 | 36.25 | |
| " | 19th, 1911 | 37.25 | |
| " | 26th, 1911 | 39.50 | |
| Dec. | 3rd, 1911 | 37.00 | |
| " | 10th, 1911 | 37.00 | |
| " | 18th, 1911 | 39.25 | |
| " | 24th, 1911 | 39.25 | |
| " | 31st, 1911 | 36.75 | |
| Jan. | 8th, 1912 | 39.25 | |
| | | | 1,629.00 |
| Less cash refunded for R. R. Fares advanced by artists— | | | |
| Week of February 26th, 1911 | | 14.50 | |
| " " July 16th, 1911 | | 40.50 | |
| " " August 28th, 1911 | | 20.00 | |
| | | | 75.00 |
| | | | 1,554.00 |

We certify that the above is correct according to the amounts due to date.

7

CATRON & ALBERT,
By W. S. ALBERT.

*Answer of Fletch M. Catron, Filed 11th February,* 1913.

This defendant for answer to so much of the bill filed against him and others in this cause, as he is advised it is material for him to answer, answering says:

It is true that this defendant and defendant W. S. Albert were engaged in the theatre business at the Airdome in Chattanooga and that they are indebted to complainant in some sum, the exact amount of which defendant does not know and demands strict proof. This defendant does not know of the negotiations and contracts between complainant, defendant Albert and the defendant Tennessee Realty

& Leading Company, but so far as these allegations are material as against this defendant, he demands strict proof thereof.

For further answer this defendant says that on the 5th day of February 1913, he filed his petition in bankruptcy in the District Court of the Eastern Division of Tennessee praying to be adjudged a bankrupt and in his schedule of indebtedness, he listed the claim of complainant against himself and defendant Albert. Therefore this defendant is advised and so charges that all proceedings in this cause against him should cease. Defendant will file at the proper time if necessary, a certified copy of the adjudication of himself as a bankrupt by the District Court of the United States.

Defendant denies each and every allegation in the bill not herein specifically admitted and demands strict proof thereof.

And now having answered, he prays to be hence dismissed with his costs.

FLETCH CATRON,
By LEWIS M. COLEMAN.

COLEMAN & FRIERSON,
*Solicitors for Defendant.*

*Demurrer and Answer of W. S. Albert, Filed 13th February,* 1913.

8 Comes the defendant W. S. Albert, one of the defendants in the above styled cause, and demurs to the original bill of complainant, filed on February 5th, 1913, and assigns the following ground of demuu-rer:

The bill (In caption) shows that complainant is a foreign corporation, having its situs in the city of Chicago, and State of Illinois.

The bill (page one) shows, and it is als- shown in Exhibit No. 1 thereof, that this action is based upon account and contract which were shown to have been made in Hamilton County, Tennessee, towit (1) account owing, as alleged in the bill, by defendants Catron & Albert, managers of the Airdome Theatre at Chattanooga, Tennessee to complainant, for booking commissions and office service for various weeks and (2) a contract made just prior to the institution of this suit between the complainant and its legal representative and the defendant Albert and his legal representative, with respect to the holding of certain money on the part of the defendant Tennessee Realty and Leasing Company, which money was the property of said defendant Albert, and which, as alleged in the bill, was to be held for the benefit of the complainant.

It is thus seen that the bill shows complainant, prior to the bringing of this suit, has been engaged in doing business in Tennessee.

Notwithstanding this, the bill fails to allege or show in any part of it that complainant, as such foreign corporation, prior to the making of said account and contract, had had its charter registered with rhe Secretary of State, as required by the Statutes of Tennessee.

For this reason, the bill upon its face shows that complainant had no legal right to institute, nor has it any legal right to maintain, this action against this defendant.

And now, not waiving said demurrer, but fully relying on same, the same defendant W. S. Albert, for answer to said bill, says:

He admits that defendants Catron & Albert were partners, doing business under the name of Catron & Albert. The articles of partnership between them were executed in April, 1909, and were to run for a period of five years.

9 It is also admitted that the paper filed as Exhibit No. 1 to complainant's bill has the notation at the bottom of same as set out in the bill; however, this defendant denies that he or the firm of Catron & Albert are indebted to the complainant.

It is true that some months ago, business differences arose between the defendants Catron & Albert, and it is also true that litigation in relation to same is now pending in this Honorable Court.

The facts in regard to this matter are as follows: In December 1911, defendants Catron & Albert sold out their theatrical business in the city of Chattanooga to the Tennessee Realty & Leasing Company for $3,000 of the capital stock of said company, and also a $12,000 interest in the business of said company, which sum was to be paid in annual installments until the full amount had been paid. Subsequently, the defendant Catron became heavily involved financially and secretly and without the knowledge of defendant Albert, sold all of his said stock and interest in said contract, pocketed the money and left a large indebtedness owing by the defendants Catron & Albert.

When this occurred the defendant Albert instituted a suit in this Honorable Court setting up this indebtedness, among other indebtedness being that upon which this suit is based, which defendant Albert then supposed the firm of Catron & Albert owed to the complainant, and in that litigation it was prayed that a lien be declared on the interest of defendant Catron in said stock and contract with said Tennessee Realty & Leasing Company for his part of the said indebtedness owing by defendants Catron & Albert.

*Subpœnaly* the said Catron filed a voluntary petition in bankruptcy, and it developed that he owes a large sum individually and has very little if any property with which to pay the same.

As stated above it was suggested when said litigation was begun that the firm of Catron & Albert owes complainant the sum of $1,554, but upon investigation of same this defendant denies that said firm or either member thereof owes complainant said amount or any other sum, as will be fully shown in this answer.

10 In this condition of affairs, however, it is admitted as alleged in the bill that a representative and agent of the complainant came to Chattanooga to collect this alleged indebtedness; and it is also admitted that after his arrival complainant's legal representative had a fonverence with defendant Albert and his legal representative.

Complainant charges in his bill that it "developed" in said conference that there would be payable to defendant Albert from the Tennessee Realty & Leasing Co. several hundred dollars in excess of the amount neces-ary to litigate complainant's indebtedness.

Defendant Albert denies that any such *other* developed. The

truth is, complainant had its solicitor to call on this defendant on the day the annual settlement was to be had between defendant Albert and the defendant Tennessee Realty & Leasing Co. and defendant Albert interpreted such at that time to mean that an attachment proceeding would follow unless the defendant agreed to allow the Tennessee Realty & Leasing Co. to hold a sufficient sum to cover complainant's alleged indebtedness.

In order to avoid litigations and amicably adjust the claims between complainant and defendant, if possible, this defendant, as alleged in the bill, made the contract that a sufficient sum should be held by the Tennessee Realty & Leasing Company to cover any indebtedness which the firm of Catron & Albert might owe to complainant. This contract was an oral one, and made in the city of Chattanooga, Tennessee, at the time mentioned in complainant's bill. Said contract was made by this defendant to save attachment proceedings which he knew would follow if he did not enter into such agreement, and was made with the hope that complainant, who morally if not legally owed to this defendant several hundred dollars, would be willing to treat defendant with consideration in the settlement. Thereupon, defendant communicated with complainant or had a communication sent it, and reply came back through complainant's counsel that it would make no compromise whatever of the claim against this defendant.

Defendant says the complainant, as admitted in its bill, is a corporation having its chief situs in the city of Chicago, and
11 State of Illinois. The fact is, it is a corporation organized and chartered under the laws of Missouri, but afterwards had itself domesticated as a foreign corporation in order to carry on its business in the State of Illinois. The business of complainant is to make contracts for theatrical artists, and furnish them to various proprietors and managers of theatres throughout the country. On May 24, 1909, the firm of Catron & Albert was operating the Airdome Theatre on Broad Street, in the city of Chattanooga, Tennessee, and made a contract with complainant which was executed in the city of Chattanooga, by which complainant, for a term of five years was to furnish to said Catron & Albert at Chattanooga, Tenn., certain artists who were to come to said theatre and render theatrical performances.

This contract is in writing, and will be filed on or before the hearing of this case. It provided that the firm of Catron & Albert should pay a fee to the complainant each week for said bookings, and also a certain percent of the salary of each set furnished. Clause five of the co*n*tract is as follows:

"It is agreed that said Agent (Interstate Amusement Co.) is acting solely in the capacity of Agent of said Theatre owner (Catron & Albert) and is not liable or responsible for the failure on the part of any artist*s* or artists booked to fulfill their contracts, nor is said Agent responsible for any accident or delay that may prevent said artist or artists fro- arriving in Chattanooga, Tenn., when there *are* scheduled. It is understood, however, that said Agent will use every precaution to see that artists fulfill their contracts."

It will thus be seen that these contracts as to artists performing at the theatre of Catron & Albert were not completed ones until the artists were furnished and had actually performed at said theatre.

Defendant says until Catron & Albert sold their business these contracts which were always performed and completed in the City of Chattanooga, Tenn., amounting in all to perhaps several hundred. While they were separate contracts, yet they were all wholly different, and were of an executory nature, and no contract
12 was completed until, as stated above, the artists came and performed at said theatre in the city of Chattanooga.

Pending this relation on the part of complainant and the firm of Catron & Albert, the complainant through its officers requested this defendant to act as the agent of the complainant in helping it secure other similar contracts in Tennessee and in other Southern States. And this defendants says for several months he acted as the agent of complainant in this work. He wrote numerous letters to his friends throughout the South, soliciting business for complainant, and defendant's work was very effective and very helpful to complainant. Defendant never rendered any bill to complainant for all this work, but supposed when final settlement came to be had that complainant would be fair enough to offer either to compensate defendant, or make some proper and reasonable settlement in regard to its alleged indebtedness. Defendant had this in mind at the time complainant's agent and legal representative came to Chattanooga at the time of said settlement and gave this defendant to understand that if defendant did not pay said alleged indebtedness, legal proceedings would follow. This defendant hardly believed complainant would be so harsh as this, and hence readily agreed that a sufficient sum should be retained by said Tennessee Realty & Leasing Company until an adjustment could be had.

Defendant avers that the moving spirit of complainant at its Chicago office is Karl Hoblitzelle, and that his reply to overtures for some proper adjustment of said claim was in the nature of a telegram to complainant's counsel at Chattanooga, which read as follows:

"Will make no compromise with Albert. Collect claim in full." With this attitude on the part of complainant to force this defendant to bear all the burden of this alleged indebtedness, and to take advantage of his misfortunes at the time his partner had laid down on him, as above mentioned, this defendant refused to pay said claim. He was advised, and is not advised, that he nor the firm of Catron & Albert legally owes anything to complainant, for the reason that complainant, as shown above, is a foreign corporation, and this defendant avers it has never had itself domesticated under
13 the laws of Tennessee, so it could lawfully do business in this State, as required of such corporations.

Defendant says, therefore, that complainant has violated the laws of Tennessee by failing to register its Charter as such foreign corporation, and in the face of this violation has had agents in Tennessee who have rendered assistance to complainant in the carrying on of its business in said State. The complainant, as shown above,

made the original contract with said firm of Catron & Albert in Tennessee, as result of which more than one hundred contracts between complainant and said firm of Catron & Albert were also made and performed in the State of Tennessee, as above shown.

Defendant also says that complainant made other contracts with other people in Tennessee, prior to the institution of this suit. Complainant also has been the owner of valuable real estate worth at least $50,000 or more, in Tennessee, which was purchased for the purpose of erecting theatre buildings and for the carrying on by complainant of a more extensive theatrical business.

For these reasons, therefore, this defendant says that morally the complainant is indebted to him in a large sum, in fact, more than its alleged indebtedness sued on. Defendant also says that the firm of Catron & Albert, nor himself as an individual, is indebted to complainant in any wise because of the foregoing facts.

Defendant denies that he or his counsel made any agreement with complainant or its counsel that the money in the hands of said Tennessee Realty & Leasing Co. due to said Albert should go in payment of said alleged indebtedness of Catron & Albert to complainant. As stated above, said money was simply to be held pending the efforts of this defendant to have the complainant do the square and honest thing, and that was to reduce the amount claimed by complainant to some extent in view of the services of defendant and because of his misfortunes as set out above.

Defendant denies that complainant, by reason of this agreement aforesaid, relation to said money held by said Realty & Leasing Company, acquired a first or prior lien on said fund.

As above stated, this money is the individual money of the defendant Albert; no part of it ever belonged to the firm of Catron & Albert and this defendant solely is entitled to it. The com-
14 plainant has no legal debt which it can enforce against this defendant, hence it can have no lien on said fund.

It is true this defendant requested said Realty & Leasing Company to pay over this fund to defendant, but this was done because it is defendant's money, and the Tennessee Realty & Leasing Co. had no right to hold the same.

Defendant denies the right of this Honorable Court to order this fund paid into Court, or to hold the same in any wise, for the reason that complainant has no legal or lawful claim against this defendant, or the firm of Catron & Albert; therefore, this Court can exercise no jurisdiction whatever over said fund for the benefit of complainant.

All averments made in complainant's bill not herein admitted, denied or explained, are here and now denied, and strict proof on the part of complainant demanded.

JOE WILLIAMS,
*Solicitor for Defendant Albert.*

*Answer of Tenn. Realty & Leasing Co., Filed 5th March, 1913.*

Above defendant, for answer herein, says that it holds the sum of $1,554.00 in its hands as a depositary, to await a decision herein as to whether complainant or defendant W. S. Albert be the rightful owner of and prior claimant thereto.

On February 14, 1913, being indebted to said Albert considerably in excess of the sum above, the representative of complainant along with said Albert, jointly came to this respondent's Manager and asked him if he, for respondent, would withhold said sum of $1,554.00 pending a settlement between the parties and to secure whatever sum was finally determined as owing to complainant from defendant Albert.

The said Albert represented in this connection that he was willing for respondent to withhold said sum and pay same, or such portion thereof, to complainant as was finally determined by the parties in interest to belong to complainant, and if the parties themselves failed to agree, then such sum as in fact the said Albert might owe complainant. This respondent agreed to act as depositary under the circumstances, and to hold said fund until such decision was made.

15 Sometime thereafter and when the parties disagreed, said Albert applied to respondent and asked it to deliver the entire fund to him. Respondent having previously paid the said Albert all that was due him except the amount shown above, it declined and refused to pay the said Albert the fund thus left in its hands, which it agreed to hold for the accommodation and benefit of both parties. It was advised it could not safely pay same to Albert without rendering itself liable to complainant, and it now submits to your Honor, that it is ready and willing to pay over said fund at such time as it can have a valid and binding release in the premises. It has no interest whatever in the subject matter of the litigation, stands neutral as between the parties and now offeres to comply with any order whatsoever the Court may make as to a proper disposition of said fund, stands ready to pay same into Court when directed, and in this connection only asks that it be protected against Court costs and counsel fees herein.

Respondent therefore prays that your Honor pass an appropriate order in the premises, relieving it from payment of costs, and grant to it its reasonable fees in this behalf expended and general relief.

TENNESSEE REALTY & LEASING CO.,
By R. M. WATKINS, *Treasurer.*

STATE OF TENNESSEE,
*Hamilton County:*

R. M. Watkins, being sworn says he is Treasurer of above corporation Tennessee Realty & Leasing Co. and that the statements made and contained in the foregoing answer are true.

Sworn to and subscribed before me this 5 day of March, 1913.

SAM ERWIN, *C. & M.*

*Deposition of B. S. Muchenfuss Rec'd from P. O., Opened & Filed 14 Day of April,* 1913.

Deposition of B. S. Muchenfuss, Taken Pursuant to Commission, on 4th Day of April, 1913, at the Office of Messrs. Peirce, Hulbert & Hopkins, 257 Broadway, City of New York.

Said witness being duly sworn deposes as follows:

Int. 1. Please state your name, age, residence and occupation?

To first int. he answers:

16 My name is Benjamin S. Muckenfuss; age 50 years. I reside at 257 W-st 45*st* — New York City.

Int. 2. State whether or not you are acquainted with the defendant W. S. Albert, and if so, how long you have known him; and also state whether or not you were at any time, if so when, in the service of the complainant Interstate Amusement Co., of Chicago, Ill. and in this connection state what were your duties in such service, etc.?

To 2nd Int. he answers:

I am acquainted with the defendant W. S. Albert having known him for about five years; I was in the employ of Interstate Amusement Co. from July 1906 to March 1st, 1911. I was the booking manager of the Interstate Amusement Co. Booking Agent means the man who procures the vaudeville attractions for the different theatres.

Int. 3. State whether or not the complainant Interstate Amusement Co. ever purchased or owned any real estate in Tennessee, in its name or in the name of any other person, for theatrical purposes. If you state that it did purchase or own any real estate, state where the property was situated, about when it was purchased and just how you get this information?

To 3rd Int. he says:

To my knowledge the Interstate Amusement Co. owned no real estate in Tennessee. To my knowledge they never owned any. I believe that the President of this Company owned some property in Nashville, Tenn. I cannot say when he purchased it, if he did. I got this information from the President personally in conversation with him.

Int. 4. State whether or not the Interstate Amusement Company ever carried on any business in Tennessee; if so, through whom, and in just what way it carried on its business in Tennessee, and state particularly whether or not it ever had an agent or agents who transacted its business in Tennessee? If so, please give the name and address of such agent or agents, what they did, etc.?

To the 4th int. he says:

They, the Interstate Amusement Company booked houses in Tenn. The booking of course being done from the main

17 office in Chicago. They had no resident manager or agent in Tennessee, but from time to time they had men travel-

ling in the south soliciting business for them, and naturally Tennessee was visited in the itinerary of the South. I, myself, made a trip in 1909 through the south for the company. I can only speak for myself. I visited different cities where that had theatres and solicited their business for the Interstate Amusement Co.

Int. 5: State whether or not you or any other representative or official of the Interstate Amusement Company, to your knowledge had any agreement or arrangement with the defendant W. S. Albert, of Chattanooga, Tennessee, by which he was to represent the complainant Interstate Amusement Company here in Tennessee and other Southern States, in obtaining booking contracts; and if you state that you did or have any information upon this subject, please state just what the arrangement was, what was done in relation thereto, and whether or not Mr. Albert performed valuable services, or otherwise, for the Interstate Amusement Company. Please state fully all the facts in regard to this matter.

To the 5th Int. He answers:

Mr. Albert as far as I know did not have any written contract with the Company to represent them, or to solicit bookings, but he was written to repeatedly by both the President and myself, in the name of the Company asking him to use his influence in obtaining bookings for the company and it was through his influence to a large extent that at least three theatres were induced to give their bookings to the Interstate Amusement Co. I consider that Mr. Albert performed very valuable services.

His theatre was the second one, if I remember correctly that we obtained in the southern territory, and if Mr. Albert had not been so influential in that territory we would not have been able to secure the strong footing we subsequently acquired.

Int. 7. If you know any other facts which will be of benefit to either of the parties to this cause, please state same as fully as if you were asked in regard thereto.

To the 7th Int. He answers:

A Mr. Steinhart, claiming to represent the Interstate Amusement Company, questioned me as to what my answers would be
18 and I stated that I would answer the questions truthfully, briefly and to the best of my ability. I gave him information as to the whereabouts and when I would make this deposition, stating that I had nothing to do with that part of it, and that he must consult with the Commissioner and settle for his appearance. I felt that as I had nothing to conceal I would prefer that both sides heard what I had to say.

Cross-examination:

1. Your duties, while in the employ of Interstate Amusement Co, were simply those of a booking manager, were they not?

To 1st Cross. Int. he answers:

Yes. I am booking manager of complainant.

2. Did you have any written contract with the Company, and if so, file a copy of it.

To 2nd Cross Int. he answers:

No, I had no written contract with the Company I was engaged by the president and approved by the Board of Directors.

3. You had no authority to appoint agents to act in behalf of the Company, did you?

To the 3rd cross Int. he answers:

*You had no authority to appoint agents to act in behalf of the company, did you?*

Ans. No I had no authority to appoint agents for complainant.

4. If you say that you ever appointed any agents, state who they were, where they resided and what powers and duties were entrusted to them as such agents.

To the 4th cross Int. he answers:

I never made any appointments of agents for complainant.

5. If you appointed or commissioned any such agents, state whether you appointed or commissioned them in writing, and if so, where will any evidence or evidences of such agencies by you created *to* the company be found?

To 5th cross Int. he answers:

I never made any appointments of such.

6. Isn't it true that so far as you personally know said Company never purchased or owned any real estate whatsoever in Tennessee?

19 To the 6th Int. he answers:

As far as I know the complainant Company never purchased any property in Tennessee.

7th. If you say you have any personal knowledge of such transaction please state from whom and when such purchase was made, give a description of any land or lands purchased by said company, who conducted the negotiations on behalf of the company, and tell all details thereof, speaking from your personal knowledge.

To 7th cross Int. he answers:

I have no knowledge of complainant company making any purchase of real estate in Tennessee.

8. Isn't it true that at the time inquired about in the interrogatories in chief, propounded to you, Mr. Albert was connected with a Play House in Chattanooga, known as the Airdome?

To 8th cross Int. He answers:

Mr. Albert the defendant was manager and principal owner of the Airdome Theatre in Chattanooga, Tenn.

9. And isn't it further true that it was decidedly to Mr. Albert's advantage, in view of his said connection, that the Company above should make more and larger booking contracts in the southeast?

To 9th Cross Int. He answers:

It was, to defendant Albert's advantage that complainant Co. make more booking contracts in southeast, because the more theatres the Interstate booked in that territory, the greater the advantage to Mr. Albert, for by giving a vaudeville attraction longer employment, the better class of acts could be induced to go south and at more reasonable rates.

10. Wasn't this true because the more towns the Company above was able to book in the southeast, the greater the number of weeks the company could offer the acts thus booked in that territory, and as a consequence these same acts which were booked for appearance in Mr. Albert's play house in Chattanooga would cost his play house less money by reason of the increased circuit?

To 10th cross Int. he answers:

Yes, such is the fact.

11. Isn't it further true that the more towns or places that were booked in the southeast the smaller the railroad fares for the players would be from point to point in this way the cost to Mr. Albert's play house where these same players appeared in the South eastern circuit would be reduced?

To 11th Cross Int. he answers:

Yes. The more towns in a territory, the smaller the railroad jumps and it is a saving all around.

12. Isn't it further true that the more towns the said Company booked in the Southeast, the less chance there would be for other booking agencies to look in the same territory and thereby reduce the probable success of play houses in Chattanooga which were rivals of Mr. Albert's house?

To 12th cross int. he answers:

That may be true and it may not. The fact that of one booking corporation making a success will induce others to enter that territory, as has been proved by present conditions, I do not think a monopoly disadvantageous to the small end of the transaction.

13. During the period above, the Company acted as the booking agency for what is known as the Southeastern Circuit, and in Chicago booked plays and amusements and routed them through Southeastern territory didn't it?

To 13th cross Int. he answers:

Yes.

14. And during such time was not Chattanooga one of the points touched in the Southeastern circuit, and wasn't Mr. Albert's house the only one in Chattanooga for which said Company booked?

To 14th Cross Int. he answers:

Mr. Albert's house in Chattanooga was the only house that this company booked for the reason that the Interstate booked only one house in any city they entered.

15. Didn't Mr. Albert's play house enjoy exclusively the privilege and use of said company's bookings in Chattanooga during the period inquired about in chief?

To 15th Cross Int. He answers:

They did:

B. S. MUCKENFUSS.

Sworn to and subscribed before me this 11th day of April 1913.

CHARLES E. RAMIREZ.

[SEAL.] *Notary Public.*

21 *Deposition W. S. Albert. Filed 9th June,* 1913.

My name is W. S. Albert; my age is forty five year old. I reside at Chattanooga, Tennessee, and occupation at present is farming, and I am one of the defendants in this case. Until recently I was in theatrical business, and had been for possibly twenty five or more years, in various parts of the United States, but principally in Chattanooga, with headquarters, when out of the city of Chattanooga, in New York City. I was a member of the firm of Catron & Albert, who operated the Airdome at Chattanooga, Tennessee, recently. This partnership operated this theatre from commencement in April 1908 until we consolidated with the Majestic Theatre, January 15, 1912; the character of attractions of the Airdome Theatre was vaudeville.

I am personally acquainted with Mr. Karl Hoblitzelle, the President Mr. Asby Chouteau, Secretary and Treasurer, Miss Celia Bloom, Booking Manager, and prior to that time, Mr. B. S. Muckenfuss, Booking manager, all of complainant Interstate Amusement Co. of Chicago and have been for possibly four years—between three and four years. The complainant owns or controls by leases theatres in Texas and one in Little Rock, Arkansas, and are also booking agents, wherever they can secure houses to take their booking. Catron & Albert, on or about May 24th, 1909, made a contract with the complainant Interstate Amusement Company. I have a duplicate of same and file it as exhibit "A" to this my deposition.

This contract is signed by the Interstate Amusement Company. B. S. Muckenfuss, Booking Manager, and there is a blank line below that, which is undersigned, was for the signature of Catron & Albert. The original is held by the complainant. The first negotiation for this contract that through a representative of the Southern Railway Company, who came to me with a letter fro- B. S. Muckenfuss asking me if I would be willing to take my bookings from the Interstate Amusement Company. This was something, I believe, in the early part of April, or May 1909. I told him to give me Mr. Muckenfuss' letter, and that I would take the matter up
22 with him which I did, and it resulted in this contract.

Catron and Albert signed this contract in Chattanooga. I think we signed contract after complainant *and* signed it—I am positive it was after it came back here signed.

The firm of Catron & Albert continued to take the bookings of the Interstate Amusement Company under this contract until the time we closed our deal with the Majestic Theatre January 15, 1912. At various times bot*j* Mr. Hoblitzell and Mr. Muckenfuss and Miss Bloom, and I should add Mr. Karl Reddick, their Traveling representative, saw me, and asked me to represent them by using my utmost influence with the Southern managers, all of whom I knew personally, to secure the bookings of their houses.

I refer to the managers of the Southern territory, who had previously organized what we call the Southern Advanced Vaudeville Association.

I mean owners and representatives of theatres in South.

Mr. Hoblitzell was president of the Interstate Amusement Company, and Miss Block succeeded Mr. Muckenfuss as Booking Manager of that Company.

Mr. Muckenfuss made similar requests of me.

Mr. Muckenfuss came here in person and spent a day or so here, and he verbally requested me to exercise my influence in their behalf.

—. How were the other requests on the part of Miss Bloom, Mr. Hoblitsell and Mr. Reddick made?

A. Partly in person, and partly by letter.

—. Have you any of these letters now?

A. I don't know that I have.

—. Now, then, Mr. Albert, about what were the dates of these requests if you can give them?

A. Well, they were early—what I mean to convey is, that they were just about the time the Airdome had started their bookings with the Interstate Amusement Company, and that was about the first of May, 1909.

30. Now, detail at length what you did, in pursuance of these requests, towards negotiating with other southern theatrical managers and whether or not you accomplished anything in your efforts to obtain other contracts for the complainant Interstate Amusement Company?

23

A. I wrote many letters, long and exhaustive and explicit, to most of these managers who owned and controlled theatres in the South, explaining to them the advantages of getting their booking- through the Interstate Amusement Company; that their line of contracts was very superior to any we had ever received from other booking agencies, and that by taking their bookings from them it would certainly be to their benefit.

31. To whom did you write these letters; give the names of those to whom you wrote?

A. Some of them are George S. Brantley, Charles- S.C., A. R. Hoyt, Jacksonville, Fla. Charles Kuhle, Charlotte, N. C. F. M. Simmons, Charlotte, N. C. Vucovich, Pensacola, Fla. A. H. Dudley, Columbia, Ga. A. H. Dudley, Macon, Ga. Frank Rodgers, Knoxville, Tenn., W. P. Ready, Nashville, Tenn. H. L. Sperry, Nashville, Tenn., Clyde, Shropshire, Nashville, Tenn., R. H. Waller, Nashville, Tenn., R. M. Watkins, Chattanooga, Tenn., W. B. Russell, Chattanooga, J. Frank Head, Hot Springs, Ark. And there were a number of others in Asheville, N. C. and Columbia, S. C. and a few others in the Southeastern territory whom I have forgotten.

32. Now Mr. Albert, do I understand you to say that you wrote personal letters to all these persons you have mentioned in behalf of the complainant Interstate Amusement Company?

A. I either wrote or consulted personally with all these people I have named, and many others whose nemes I cannot now recall.

33. At the time the complainant requested you to assist it in getting contracts with these people, state whether or not any of these people had connection with the complainant?

A. None of them whatsoever.

34. All the parties whose names you have given were connected with theatres which were using attractions similar to those furnished by the complainant Interstate Amusement Company?

A. Yes sir, they were getting their bookings through other agents at the time?

35. I will ask you whether or not you were successful in getting any of these parties or any others to use the bookings of the
24 complainant, and whether or not you were valuable or performed valuable services for the complainant in this respect?

A. I felt that I was, decidedly, very influential in getting them.

36. I will ask you whether or not you had a personal acquaintance with those parties to whom you wrote soliciting bookings for the complainant?

A. In nearly every instance, I might state, in every instance, except the last ones I have given at Asheville and Columbia, I did know the Columbia managers but have forgotten.

37. I believe you stated all those parties whose names you have just given were connected with vaudeville theatres in the South?

A. Yes sir.

38. What was the real value of——

A. I don't mean to say all of these parties eventually took their bookings with the Interstate Amusement Company.

39. I understand. What was really the value of a contract with a house operating as these were, or doing such business as they were, who would go into the circuit of the complainant—the value to the complainant, I refer to?

A. I mean the benefits the Interstate Amusement Company would receive from them?

40. Yes.

A. They would not only get a commission of five per cent on the gross amount of the bill that was furnished weekly, but they also charged a weekly booking fee to each house running from $10. to various sums. But the greatest benefit was to the Interstate Amusement Company itself, the complainant, who, by enlarging their circuit derived a benefit approximately thirty five to fifty thousand dollars a year, because they had so many more weeks they could carry the accts. and in consequence reduced the salary weekly of these ac-ts. which they could not do formerly when they only operated four or five houses in isolated towns and cities in Texas and Little Rock, so far removed from Chicago, their headquarters.

41. Mr. Albert, have you any letter that you wrote to any of these people, or any answer, showing work you would do towards getting bookings for the complainant?

25 A. Yes sir.

42. If so, please file same as Exhibit "B" to your deposition.

A. This letter which I have and wish to file as exhibit "B" to this, my deposition, is a sample of the work I did for the Interstate Amusement Company. It is a letter from the home office of the complainant, signed by Miss Celia Bloom, Booking Manager, addressed to me, and is dated February 28, 1912. I file it as requested.

43. That letter appears to have considerable memoranda on it. State how this came to be on the letter, and all about it?

A. This memorandum is my own data that I put up to show to Mr. H. L. Sperry, President of the Tennessee Realty & Leasing Company, giving the comparative cost between bookings furnished by the Hodkins Booking Agency and showing the relative cost of bookings furnished by the Interstate Amusement Company. I received this letter in due course of mail, made this memorandum on it and sent it through the mail to Mr. H. L. Sperry, at Nashville, Tenn. soon after it was received, and in April of this year I wrote Mr. Sperry for it, and on April 10, 1913, he sent it to me by mail. And I wish to say that I also wrote Mr. Sperry a very long, concise explicit letter at the time I submitted this letter to him.

44. Mr. Albert, would you undertake to say about how many letters you wrote for the benefit of the Interstate Amusement Company, during the period you have mentioned?

A. They were numerous. I have no conception of the number. I was writing more or less letters every week to somebody wherever I would hear of anything that I thought would be of benefit to the Interstate Amusement Company.

45. The complainant has alleged in its bill in this cause that you are indebted to it in the sum of $1554. under the contract in question. State whether or not you are so indebted legally to this complainant?

A. Legally, I believe I am, but morally, I do not feel so. But I have always anticipated an equitable adjustment of this matter, and since they were so arbitrary in the matter, in not giving me an opportunity to take this matter up with them, but immediately sending a legal representative down here and on top of the same
26 wiring to accept no compromise with Albert, but to collect amount in full, and being advised that legally I do not owe any amount to this corporation, I decided I would leave the matter to the courts to decide.

46. The claim is made in the bill Mr. Albert, that you agreed for the sum of $1554. to be held by your co-defendant Tennessee Realty & Leasing Company of the money which belonged to you, for the benefit of the complainant Interstate Amusement Company, and that this was really a conveyance of that money to complainant. State the facts in regard to this, and whether or not this is true.

A. It was no conveyance whatever, but I felt that sendinfg their attorney to see me that it meant a case of attachment of my own personal funds, and I agreed that the fund should be held until I could arbitrate the matter with the Interstate Amusement Company.

47. You mean by "arbitrate" that you would make efforts to compromise, or what do you mean by "arbitrate"?

A. That they would not only compromise, but possibly see where they were morally bound to me to wipe out the indebtedness when it came to that.

48. I will ask you whether or not, prior to this arrangement wherein you agreed for this money to remain with your co-defendant Tennessee Realty & Leasing Company, whether or not you had notified

the complainant that you would have this amount of money due you about the time this legal representative appeared?

A. Yes sir, they had been notified on several occasions of the progress of my earnings from the Tennessee Realty & Leasing Company.

49. Now, I will ask you if the present legal representative of complainant, Mr. W. B. Miller, came to you on the day you made this agreement, and insisted on you making the agreement you did, by which you left this money with the Tennessee Realty & Leasing Co.?

A. Yes sir.

50. And, as I understand you, you did not agree with the legal representative of complainant, or any one, that it would be the complainant's money, but that you would simply lease it there until you could see about getting a compromise with the complainant.

A. Yes sir.

27 51. Now, after that money, $1554. was left with the defendant Tennessee Realty & Leasing Company, did you undertake to make an adjustment with the complainant, and if so, what did you do?

A. I went to the long distance telephone, and put in a call for Mr. Hoblitzelle, at the Majestic Theatre Building, Chicago, Ill., but never got into communication with him. Shortly after that, evidently Mr. Miller, who represented Mr. Hoblitzelle, or the attorney from Knoxville, had communicated with Mr. Hoblitzelle I had offered a compromise, and immediately after communicating with Mr. Hoblitzelle he wired not to accept any compromise whatever from me but to collect the entire amount.

52. I hand you letter which purports to have been written to your present solicitor, dated January 24th, 1913, signed by Mr. W. B. Miller, solicitor for complainant. Please state if this was shown you about the time it is dated, and also file it as exhibit "C" to this, your deposition?

A. It was shown me and I file it as requested.

53. Now, you say that during these negotiations that notwithstanding you believed you did not owe complainant anything, that you offered $800 in settlement?

Mr. W. B. MILLER: This is objected to, because it is respectfully submitted the witness has stated no such thing.

54. In these negotiations, did you offer or authorize any one to offer for you, to make an adjustment of this claim if it could be done, by you paying $800?

A. I personally said to W. B. Miller, right in your office here, that I would be willing to pay $800 which is a little more than my half of the indebtedness.

55. I will ask you if it was in pursuance to that offer that Mr. Miller on January 24th, 1913, wrote the letter which you have filed as Exhibit "C" to your deposition?

A. I presume so.

56. Now, prior to that time, state whether or not your partner, Mr. F. M. Catron, had gone into bankruptcy?

A. Yes sir.

28 57. State whether or not he had secretly and clandestinely sold out all his interest in the Tennessee Realty & Leasing Company, and collected on it without letting you know anything about it?

A. Yes sir, he did.

58. As result of this conduct on Mr. Catron's part, and his insolvency, state about what amount, if any, you had to assume or pay individually, or that you became obligated to pay, if it was a valid indebtedness against the firm of Catron & Albert?

A. I became obligated to pay $2704.

59. State whether or not that included the alleged claim of the complainant—$1554.

A. Yes sir.

60. I will ask you whether or not the firm of Catron & Albert had any property at all at this time, except your interest in the contract and stock of the Tennessee Realty & Leasing Company and claim which Mr. Catron had formerly had in that concern?

A. Nothing, except some everglades property and that is all.

61. About what would that amount to?

A. Well, it would amount to, I suppose not over $300. if we wanted to sell it.

62. To correct you, I will ask you if your firm at that time did not also own a small tract of land in Georgia and Alabama; and if you have sold your interest in that since that time, state what you got for it and if that is its reasonable value?

A. We did own a small tract of land, and I sold my share for $175.

63. Was that, or not, the reasonable value?

A. Yes sir.

64. The other half going to Catron, what became of that?

A. It was put in his bankruptcy proceeding.

65. Do you know about what percentage Catron's estate will pay on his indebtedness?

A. I have not the remotest idea; but don't think it will be anything hardly.

66. Mr. Albert, during your connection, or while you were writing these letters and using your influence for complainant, trying to get contracts for it, state whether or not its officers came to Chatta-

*booga* many or few times and conferred with you in regard to

29 this matter?

A. On several occasions several of the officers came to Chattanooga.

67. Name them.

A. Karl Hoblitzelle at least twice that I remember of; B. S. Muckenfuss, once that I remember of; Rose Lee Muckenfuss, Assistant Booking Manager once that I can remember positively, and Karl Reddick, traveling representative and Ashby Choteau and another representative by the name of Renny and another that I can't recall.

68. Mr. Albert, if you were to charge a reasonable compensation for the services you performed for the complainant at its request,

what would be the reasonable value of the same; would it be more or less than the amount which the complainant is now suing for *on* this cause?

A. I think it would be much more.

70. I will ask you whether or not you are solvent—that is, you have sufficient property to pay all of your indebtedness?

A. I have.

Cross-examination.

Q. 1. Do you mean, Mr. Albert, that for the letters you have stated in your examination in chief that you wrote, that you think $1500. or more would be reasonable compensation to you?

A. No sir, not only for the letters but the results that they brought and my influence and exertions.

Q. 2. Then you are not speaking *than* about the work which you did but the results of somebody else.

A. I am speaking of the benefits that the complainant derived from my work that is what I am speaking about. You don't estimate the work you do by the letter your stenographer writes, do you? You charge in accordance with the results.

Q. 3. I don't take all they have. I charge a fee for what I do, but I don't keep all the benefit of the results myself. Now, about this contract—this blank contract—that you have exhibited, you say that that came to Chattanooga signed?

A. Yes sir.

30 Q. 4. Was sent to you through the mail from Chicago?

A. Yes sir.

Q. 5. In duplicate, I suppose, and you signed and sent one copy back through the mail to Chicago?

A. Yes sir.

Q. 6. You speak about the complainant or some of its officers having requested you to use your influence with some of your friends over the South to induce them to take the bookings of the complainant, and I suppose you did that as a matter of courtesy, did not you?

A. No sir, not entirely as a matter of courtesy.

Q. 7. Did you make any charge for it?

A. No definite sum was stipulated, no sir.

Q. 8. Have you got a copy of letter either a letter you received or copy of letter you ever wrote, Mr. Albert, in which there is any intimation that you were making any charge, or intended to make any charge for what you had done or would do in behalf of the complainant.

A. No sir, I believe not.

Q. *8*. The fact is, that when this suit was brought, or a few weeks before it was brought, that the present solicitor, who is now cross-examining you in behalf of complainant, came over to the office of your present solicitor, Judge Williams, and there had a conference with you and Mr. Williams, isn't that true?

A. Yes sir.

Q. 9. And you were told at that time by Mr. Miller that he ap-

peared only as representative of the complainant, and only because the traveling representative of the complainant was in the city, and had called to see him at his office?

A. I believe that is right. No, I beg to correct that. I think when you came over here the gentleman whom you said was the traveling representative had left the city and returned to Knoxville. I may be confused on that, however.

Q. 10. At any rate, you understood the object of the representative in coming to Chattanooga about that time was because you had previously written to the complainant that on or about that day the Tennessee Realty & Leasing Company would make settle-
31 ment or partial settlement with you and Catron?

A. Yes sir.

Q. 11. And you had repeatedly promised the complainant that when that settlement was made, this indebtedness would be adjusted, didn't you?

A. I had written them to that effect, but did not know or anticipate that my partner, Mr. Catron, would surreptitiously sell out his interest unbeknownst to me to these Nashville parties, and not meet his half of the indebtedness.

Q. 12. Well, I say you had previously written the complainant more than once that settlement would be due you on the part of the Tennessee Realty & Leasing Company at a certain time, and that this indebtedness would be paid?

A. I certainly did, sir, like I intended.

Q. 13. And at that time you were not claiming any offset or release or counterclaim by reason of these previous courtesies on your part, in writing to your associates throughout the South in behalf of the complainant, were you?

A. Yes sir, I certainly did, as I had planned to go to Chicago prior to this settlement, or when this settlement was adjusted between the Tennessee Realty & Leasing Company and Catron & Albert to see if I could not get a compromise from Mr. Hoblitzelle in acknowledgement of the services I had rendered, and has *do* stated in a conversation with Mr. Catron.

Q. 14. Well, at any rate, you had not put the complainant upon notice that you were claiming anything up to that time?

A. No sir.

Q. 15. Now, when Catron made some disposition of his property which you were not satisfied with, you immediately advised complainant that Catron was disposing of his property and suggested that the complainant take steps to assert its claim and protect itself against loss from Catron, didn't you?

A. I don't just recall, Mr. Miller.

Q. 16. Didn't you write a letter to the complainant, and in substance advise it of the supposed fraudulent disposition by Catron of his property and suggest that they ought to get active and
32 try to reach his portion that was coming from the Tennessee Realty & Leasing Company?

A. I don't recall it, because it all came up at the same time, you know, Catron's doing this trick and just prior to this settlement.

Q. 17. You did notify complainant that Catron had made disposition of his property, didn't you?

A. I don't recall it, sir, and in fact, it seems to me I was wondering how they found it out, they seemed to have been aware of the facts in some way, I don't recall.

Q. 18. I think I can produce a letter to that effect, and if I do produce it, I would like for you to file it as defendant's exhibit No. 1 to your deposition?

A. I will do so. It may be that I am mistaken about this but I don't recall. The chances are that I might have done so.

Q. 19. Now, if it was due to your influence that the complainant reaped certain benefits from contracts that it was enabled to make in other sections of the country, you had never at any time asserted any such claim to the complainant until about the time of the agreement that the Tennessee Realty & Leasing Company should hold this money, had you?

A. I had never made any clai-, but I was continually reminding them of the obligations that they were under to me for my services, and I think you can have them produce several *el*tters from me to that effect.

Q. 20. Well, if you ever received a letter from them from the complainants, on that subject, or have any copy of letters that you wrote on the subject to the complainant, I will ask you to produce it now?

A. I can show letters where they said they were under many obligations to me for my services.

Q. 21. Just file any such letters as you have, Mr. Albert.

A. Here is one, dated September 5th, 1912, from Mr. Hoblitzelle and one from Mr. Muckenfuss dated March 22, 1912, which I file as defendant's exhibits Nos. 1 and 2 respectively.

Q. 22. Now, I notice in this Exhibit No. 2, Mr. Hoblitzelle says that he trusts the Majestic will continue to prove a paying
33 proposition, so that in the end you will get the compensation you so justly deserve. What did he mean, what did the Majestic have to do with it?

A. Well, that may be a little rhetorical speech of his.

Q. 23. It clearly implies that*m* and as you understand, that he hopes your interest and work in b*e*half of the bookings of the complainant would be more than repaid through the Majestic, did he not?

A. I don't know why he should assume anything of that kind. And if he did assume, it, I think it would be presumptious on his part to think that the Majestic which was a foreign corporation, and which was not even using their bookings, would compensate me for work I was doing and had d*o*me for him.

Q. 24. But you were trying to get the Majestic to do its bookings through the complainant Company were you not?

A. I certainly did, because it added one more strong link in their chain. I might state that eventually I was successful in getting the Interstate Amusement Company's bookings used in the Majestic.

Q. 25. Well, the Majestic theatre was being operated by the Tennessee Realty & Leasing Company, was it not.

A. Yes sir.

Q. 26. And you are a stockholder in the Tennessee Company, are you?

A. I am.

Q. 27. It pays a very good dividend, don't it?

A. I don't know what you call "very good"?

Q. 28. Well, it pays a good deal better than any of the banks in Chattanooga, does it not?

A. We have not had a settlement this year yet. My contract with them last year paid a little better, possibly than the percentage of the banks.

Q. 29. You, after a conference with your solicitor, Judge Williams, went with complainant's legal representatives, down stairs to the office of the Majestic Theatre and there made whatever agreement was made with Mr. R. M. Watkins, representing the Tennessee Realty & Leasing Company, by which certain funds
34 that would otherwise be payable to you were left on deposit with Mr. Watkins' Company, did you not?

A. They were to be left on deposit, yes sir, until we could arbitrate the matter with Mr. Hoblitzelle.

Q. 30. But, I say, you and the complainant's representative went from your own solicitor's office down to see Mr. Watkins, and made this agreement?

A. Yes sir.

Q. 31. Before going the subject matter of the agreement was talked of there in Mr. Williams' office, and, in fact, Mr. Miller wanted Judge Williams to go down with you, didn't he?

A. I don't recall that. I remember we went down there.

Q. 32. You recall Mr. Williams talked it over with me before we went down, as to what the contract was to be?

A. I don't recall that, because we discussed the entire matter. I am not trying to evade anything, Mr. Miller.

Q. 33. The officers of the complainant Company, whom you say occasionally visited or passed through Chattanooga, were making trips throughout the South and stopped over to see you from time to time, were acquaintances of yours?

A. Yes sir.

Q. —. You were in a business allied with theirs, in a way?

A. Yes sir.

Q. 35. You don't claim that any representative of the complainant ever promised you any reward or compensation for your services in trying to get other houses to take their acts, do you?

A. No, I can't say that they did, except that I thought, morally, they were obligated to me and as they did not press this matter of the indebtedness that was accruing each week, I presume, because of this leniency and other things that they had realized the value of my services to them and were treating it possibly until final adjustment was made in some way.

Q. 36. You mean then, that because it allowed its bill to run

from January 15th, 1910, to January 8th, 1912, as shown by bill filed with its bill in this case, that you supposed it was going to show you some more consideration in final settlement?

35 A. Well, in fact, I might say it was my entire idea that I gleaned from the conversation and letters they were going to deal with me very leniently as far as that is concerned, and that they realized that they were under obligations to me.

Q. 37. Then why was it, Mr. Albert, that you soon after January 4th, 1912, signed and certified a statement filed with the original bill, in which you said:

"We certify that the above is correct according to the amounts due to date.

(Signed) CATRON & ALBERT,
By W. S. ALBERT."

A. Well, I think this is something—oh, this amount here. What is your question?

Q. 38. My question is, if you thought you were entitled to an offset, or counter-claim or release of any portion of the indebtedness sued for, why was it that you thus o. k.'d, approved and acknowledged the itemized statement which is filed as exhibit to the complainant's bill.

A. They wrote me requesting it, saying that while this was fresh in my memory, would I kindly check it up and see whether the amounts were correct which I did, and certified to it, as you have it there, and also to acknowledge that I did not intend to be a rascal in any way, so far as the indebtedness was concerned, which I had no idea of being.

Q. 39. You signed that and restored it to them?

A. Yes sir. I would not have sign- it and returned it had I wished to evade anything at all.

Q. 40. And more than once during the months that followed, you promised to pay it when settlement was made with the Tennessee Realty & Leasing Company, didn't you?

A. I believe I did.

Redirect examination:

Q. 71. At the time you made this agreement as to leaving the $1,554 with Mr. Watkins, of the Tennessee Realty & Leasing Company, state whether or not you had any apprehension that that fund would be attached by the complainant.

A. Yes sir, I thought that was the idea.

36 Further this deponent saith not.
Signature waived.

Sworn to before me this June 5th, 1913.

[SEAL.] JOE V. WILLIAMS,
*Notary Public.*

37 Karl Hoblitzell, President. Azby A. Chouteau, Jr., Treasurer.

Interstate Amusement Company
(Incorporated).

Majestic Theatre Building, Chicago.

Affiliated with Western Vaudeville Manager Association.
Proprietors Interstate Circuit of Vaudeville Theatres.

Miss Celia Bloom, Booking Manager.

February 28th, 1912.

Mr. Will S. Alberts, Mgr. Airdome Theatre, Chattanooga, Tenn.

DEAR MR. ALBERTS: I am in receipt of your favor of the 27th. I want to apologize for neglecting to answer your last letter, but the fact of the matter is, I was waiting for Mr. Hoblitzelle to return to Chicago, to take this matter up with him.

In regard to supplying the Majestic Theatre at Chattanooga with five acts for $525.00, I believe I could get them a show each week aggregating $550.00 by getting the acts to make a reduction for Chattanooga. Many of my bills have gone up to $650.00 down there since Chattanooga is off, as Knoxville and Charleston seem to see the necessity of playing a bigger show, and there is so much opposition in the South now on account of the United invading that territory, that we have found it necessary in Birmingham to put as large a show as we possibly can to compete with the opposition.

I would like very much to start to book the Chattanooga house, as I feel convinced that the stock-holders of that house would soon realize that it would be to their interest to leave their bookings in our hands entirely, and not stint on a matter of $25.00 in framing up the shows. They should allow at least $600.00 for a five act bill. However, as I have said in the early part of my letter, I believe I could get the acts to cut their salaries at Chattanooga, so as to bring the bill within $550.00. You cannot tell me that they were able to surround Rex's Comedy Circus with any kind of acts at all, and pay Rex $275.00 and then keep their shows within $525.00. That is an utter impossibility. I booked Rex's Circus last season at your house, for $275.00, and then I got two acts. His wife did a very good wire act, as you know, and even then my show was considerably over $525.00. Just to refresh your memory, I am quoting the above mentioned show herewith, and you will see that this is a cheap show for the satisfaction it must have given. The way salaries are quoted today, you would probably have to pay $800 for this show.

| | |
|---|---|
| Omega | $75.00 |
| Lester Bernard | 70.00 |
| Clipper Comedy quartet | 175.00 |
| Noble & Brooks | 110.00 |
| Rex's Comedy Circus | 200.00 |
| **Total** | **$630.00** |

37*a* I do not suppose the Hodkins management would ever give this office credit for getting acts as cheap as these quotations. Nevertheless, you know it is a fact that you received this show, as well as many others, through this office, at extremely low prices.

Another thing, I understand Rex's Act has deteriorated to an almost incredible extent in the last year, and that one would hardly know the act in its present condition, so you can see that the Hodkins office does not always get the acts so cheap after all. I daresay if I wired Rex this minute, and if he had the week open, I could get him again at $200.00 and this is no idle boast. Of course, the Hodkins office may have gotten acts playing on our Circuit in the past, for some week that they were open, and wanted to play in preference to laying off for a substantial reduction, but you know how those things work.

But this is neither here nor there. I will undertake to furnish the Majestic Theatre at Chattanooga five acts in the neighborhood of $550.00. Of course, I will have to know at least three weeks in advance, so as to give me time to frame up the right kind of a show.

Very truly yours,

(Signed) CELIA BLOOM,
*Booking Manager.*

37*b* (The following appears on face of the attached letter written in ink.)

*Cost of Majestic Bills,* 1912.

| | | |
|---|---|---|
| 615.00 | 1/15/12 | |
| 570.00 | 1/22 | |
| 589.00 | 1/29 | |
| 540.00 | 2/5 | |
| 464.25 | 2/12 | (6 rotten acts) |
| 335.00 | 2/19 | |
| 560.00 | 2/26 | .....(Please note only 4 acts week 2/26 with |
| 605.00 | 3/4 | 5 acts the bill would have run at least |
| 540.00 | 3/11 | 100 more making total $660.00. Then |
| 510.00 | 3/18 | again compare the Airdome Show |
| 540.00 | 3/25 | with with this one. oh! my! oh my! |
| 530.00 | 4/1 | |
| 555.00 | 4/8 | |
| 555.00 | 4/15 | |
| 580.00 | 4/22 | |
| 545.00 | 4/29 | |
| 560.00 | 5/6 | |
| 555.00 | 5/13 | |
| (498.00 | 5/20 | (6 rotten acts again.) |
| 550.00 | 5/27 | |
| 530.00 | 6/3 | |
| 550.00 | 6/10 | |
| 555.00 | 6/17 | |

530.00 6/24 .....(The week I played Schœus' Rough
565.00 7/1 House Kids I had a $585.00 bill as
555.00 7/8 follows, and it was a real show and
520.00 7/22 played to $1557.75 against the Majes-
550.00 7/29 tic's bill. Its was Xmas week. Here
550.00 8/5 in the show: M'LL. de Oesch 65.
Watkins has not sent us statement week July 15". Romano Bros. 125.00; Olive Morgan 60. Muller & Stanley 125.00 Schœs' kids 210.00.)

37c Geo. A. Washington, Vice President.
J. O. Leake, Vice-President.
W. J. Cude, Vice-President.
Henry Sperry, Vice-President.
Dr. Charles Brower, Vice-President.
E. A. Lindsay, President.
H. L. Sperry, Mgr. Stock & Bond.
Colin A. Winter, Mgr. Real Estate.
Carey A. Folk, Secretary.
Jos. L. Campbell, Ass't Cashier.

Tennessee Bank & Trust Co.

*Directors.*

| | | |
|---|---|---|
| Geo. A. Washington, | W. G. Hirsig, | A. J. Dyer, |
| H. G. Hill, | J. P. Connor, | T. P. Norris, |
| W. W. Dillon, | W. G. Thuss, | Robt. Young, |
| G. N. Tillman, | W. H. Hartford, | J. O. Leake, |
| O. K. Houck, | W. W. Parminter, | Dr. Chas. Brower, |
| R. T. Wilson, | J. S. Beasley, | E. S. Gardner, |
| D. H. Bailey, | Geo. G. Mitchell, | L. B. Pennock, |
| H. L. Sperry, | Henry Sperry, | B. F. Allnutt, |
| Carey A. Folk, | M. F. Greene, | W. H. Lindsey, |
| F. Norman Smith, | S. W. Berger, | J. W. Forsyth, |
| J. O. Cheek, | F. P. Provost, | S. B. Rickets, |
| W. J. Cude, | Jno. A. Pitts, | F. A. Kelley, |
| Jno. W. Overall, | H. H. Campbell, | G. A. Maxwell, |
| H. C. Walters, | J. T. Jenkins, | R. B. Roberts, |
| J. P. Fulcher, | Sol. Lowenstein, | E. A. Lindsey. |

NASHVILLE, TENN., Apr. 10/'13.

Mr. Will S. Albert,
Albion View, Tenn.

DEAR SIR: Enclosed find letter from Interstate Amusement Co. as requested.

Trusting you are in good health, I remain,
Yours truly,
(Signed) H. L. SPERRY.

(*Envelope.*)

Return in 5 days to
Tennessee Bank & Trust Co.
Nashville, Tenn.

Nashville
Apr.
10 8 00 PM.
1913
Tenn.

Mr. Will S. Albert,
Albion View, Tenn.

37*d* DEF'T'S EXHIBIT #3 TO ALBERT'S DEPO.

Law Officers of
W. B. Miller,
Chattanooga, Tennessee.
Trial and Corporation Practice.

37*e* W. B. Miller.
George H. West.
Burkett Miller.
Charles W. Lusk.

Jan. 24, 1913.

Hon. Joe. V. Williams, Att'y, City.

*Interstate Amusement Co. vs. Albert and Catron.*

DEAR SIR: I have communication yesterday from Mr. Drummond, reading:

"Enclosed herewith you will find a telegram from the President of the Interstate Amusement Company, advising me that he will make no compromise with Mr. Albert, and to collect the full amount of claim, which we will proceed to do at once."

The telegram enclosed reads:

"Will make no compromise with Albert. Collect claim in full.
CARL HOBLITZELLE."

I am leaving the city this evening for Cincinnati, but will return tomorrow night, and trust to have settlement Monday or certainly early next week.

Yours very truly,
(Signed) W. B. MILLER.

Exhibit "C" to Albert's depo.

37*f* EXHIBIT "C" TO ALBERT'S DEPO.

37*g* Chicago Representative of Eastern and Canadian Vaudeville Circuits. Phones... {Franklin, 498. {Automatic, 36-409.

Special Manager of a Limited Number of High Grade Vaudeville Acts.

State Board of Commissions of Illinois, Springfield, Illinois

Office of Chief Inspector of Agencies, 732 S. Wabash Ave., Chicago, Illinois.

R. S. Muckenfuss Vaudeville Agency.

Prepared to Furnish High Class Attractions for Theatres, Fairs, Parks, Airdomes, and Clubs.

(DEF'T'S EXHIBIT #3 TO ALBERT'S DEPO.)

Office, 723 Chicago Opera House Bldg.

CHICAGO, March 22nd, 1912.

"Mr. Will A. Albert, Chattanooga, Tenn.

MY DEAR WILL: Rosalie has written me of your offer regarding the ten weeks and it looks very good. I am sure, if she had not promised Mr. Murdock to remain with him, she would gladly accept your proposition. Of course, I will treat the subject in strict confidence.

Let me advise that you get your booking from New York—not Chicago, as this place, owing to the multitude of amateur acts, is dead for Vaudeville, and 300 houses have cut out Vaudeville and running only pictures.

You remember I booked your house and 3 others for over a year before I turned them over to Rosalie to book. She is my pupil and I taught her what she knows about booking. Every house that was secured for the Interstate Independent time, I secured, and you helped me get several of the houses.

Do you know anyone who understands the booking business better than I do and being also a Southerner and well known in the South, why wouldn't I suit your purpose as well as Rosalie would? I don't like being a "ten percenter" and prefer to book houses.

37*h* I have made a success at booking, and you know that the proof lies in the fact that the Interstate never made a dollar before I went with them, and have never made since I left them. The only prosperous years they ever had were the three years I managed their bookings.

I have no money because I never took a cent from a performer,

agent or manager in my life, and it took all my salary to live well and educate my children.

I am sure you can get those 10 houses, and I would like to book them from New York under the same conditions you offered Rosalie. The best acts and best prices can be had in New York and hundreds of western acts would write me to New York and go wherever I sent them and at my figures.

Think this over, Will, and if you can get some one more capable and suitable than myself, I want you to get that party, but if the idea of my association with you strikes you as being the right thing, then don't lose any time in writing to,

Your old friend and co-worker,

(Signed) B. S. MUCKENFUSS.

Best regards and best wishes.

37*i* Def't's Exhibit #3 to Albert's Depo.

37*j*

Karl Hoblitzelle, President.
Celia Bloom, Booking M'n'g'r.
Azby A. Chouteau, Jr., Treasurer.

Interstate Amusement Company,
(Incorporated).

Affiliated with Western Vaudeville Managers' Ascociation.

Majestic Theatre Bldg. Chocago.

Proprietors Interstate Circuit of Vaudeville Theatres.

September 5, 1912.

Mr. Will S. Albert, Albion View, Tenn.

MY DEAR MR. ALBERT: Upon my return to Chicago yesterday, I found your welcome letter of August 28th, and hasten to acknowledge its receipt, and thank you most kindly for the expressions of good will contained therein.

I appreciate fully everything you have done in our behalf, and sincerely trust that the Majestic will continue to prove a paying proposition, so that in the end you will get the compensation you so justly deserve.

With best wishes, I remain,

Very truly yours,

(Signed) KARL HOBLEZELLE,
*President.*

Def't's exhibit #2 to Albert's depo.

37*k* DEF'T'S EXHIBIT #2 TO ALBERT'S DEPO.

38 *Deposition of H. L. Sperry, Filed 6th June,* 1913.

Deposition of H. L. SPERRY:

Said witness being duly sworn deposed as follows:

I am of legal age; my residence is Nashville, Tenn. and occupation is banker, with the Tennessee Bank & Trust Co. at Nashville, Tenn.

I am now and have been for some time connected with the theatrical business in Nashville and Chattanooga, Tenn.

I am with the Crescent Amusement Co. here at Nashville and the Tennessee Realty & Leasing Co. at Chattanooga.

I am a stockholder in the Crescent Amusement Co. and President and director of the Tennessee Realty & Leasing Co. of Chattanooga. I have been connected with these companies about three years or more.

I am not personally acquainted with officers of complainant but I have met one that I was informed was secretary and Treasurer, a Mr. Chauteau; I have had several conferences with him. Mr. Chateau was here before the fifth avenue Theatre consolidated with the Crescent Amusement Co. I was a director of the Fifth Avenue Amusement Co. Subsequently we traded our stock or merged into the Crescent Amusement Co. after buying the Princess Theatre here Mr. Chateau came to Nashville soon after we bought out the Albert and Catron that ran the Airdome at Chattanooga. He was very anxious to put his circuit here in Nashville because it had been cut out of Chattanooga and he made some very great inducements to us, he offered to give us a split week, that is, having one show to come Monday, Tuesday and Wednesday in Chattanooga, and then another show at the same time operating at Nashville, Monday, Tuesday and Wednesday, and Wednesday night the Chattanooga show would come to Nashville and the Nashville show go to Chattanooga, thereby having two new shows a week in each house, which I was very much in favor of, and also the Fifth Avenue Amusement Co. people, and Mr. Chateau prepared a contract which we signed here at Nashville, and Mr. Furlong, the local manager here and I, got on the train and went to Chattanooga to induce Mr. Watkins and Mr. Russell, our local manager, to
39 accept this contract, because we thought it would help business there took by having what is called a split week. That was shortly after we bought the Albert & Catron theatre, and I think it was that trade was consummated in 1911, in January, 1911.

This contract which Mr. Chauteau drew up with your company or people here at Nashville, was executed by him for the Interstate Amusement Co. at Nashville in 1911.

And upon his executing the contract for the complainant myself and associates, took it to Chattanooga with a view of getting it

executed there, and we did not succeed in our purpose, and I didn't push the matter, because Mr. Russell and Mr. Watkins were both interested in the stock of the other circuit.

This contract was in writing and signed up before we left here. We left it with Mr. Watkins of Majestic at Chattanooga, so if he wanted to change his mind, he could sign and return it.

I have not this contract and cannot produce it now.

I know we met Mr. Chateau one afternoon at the Hermitage Hotel at Nashville and conferred with him, and then the Fifth Avenue Directors invited him down to their local office, the next day. He was here at Nashville a day or two and we thought we had all things right.

The Fifth Avenue of Nashville or the Majestic of Chattanooga in the Interstate Amusement Co. circuit are not now in complainant's circuit.

The contract with the complainant and the Princess was executed at Nashville, Tenn.

That contract is in the possession of Mr. Toney Sudekum.

Mr. Rennie negotiated that contract for the Interstate Amusement Co. Those negotiations were made right, as I understood from Mr. Sudekum to say, in the Fifth Avenue office in the City of Nashville. That was July 1st, 1912, I think. That is when we made the purchase. That was a written contract.

In pursuance of that contract, the Interstate Amusement Co. furnished shows to this theatre in Nashville, Tenn.

Mr. Rennie was here negotiating that contract before it was
40 finally executed I think for several days; I don't know exactly.

Q. Do you know whether or not the Interstate Amusement Co. ever purchased or agreed to purchase any real estate in Nashville, with a view of erecting a theatre in Nashville.

A. I understood they did in connection with Mr. Jesse Jones of Houston, Texas, and when Mr. Chauteau was here, told me he was going down to see Mr. Paul Davis, who was the agent and made the sale.

Q. Did Mr. Chauteau tell you anything about the Interstate Amusement Co. being interested in this real estate?

A. From his conversation, that was what I understood.

Q. What real estate was it?

A. It was the old Board of Trade building.

Q. When was that you had this conversation with Mr. Chauteau?

A. When he was here at Nashville making that contract.

Q. In the year 1911?

A. Yes sir.

Q. Was that before or after Jesse Jones had purchased the property?

A. That was after he had purchased it.

Q. And in that conversation you state Mr. Chauteau gave you to understand that the complainant, the Interstate Amusement Co. expected to erect a building for theatrical purposes on this lot?

A. He kind of held that out as a threat, if you don't take our shows, we will put a theatre here and we have got this lot down there.

Q. Are you acquainted with the defendant, Will S. Albert of Chattanooga?

A. Yes sir.

Q. How long have you known him?

A. Several years. About as long as I have been in the theatrical business.

Q. I will ask you whether or not he as agent or representative of the complainant, the Interstate Amusement Company sought to have you put your Chattanooga theatre and your Nashville theatres in the circuit controlled by the complainant, the Interstate Amusement Co.?

41 A. After we bought out the Airdome, he was most earnest in his desire and solicitations for us to change to the Interstate. What his relations were with the Interstate Amusement Co. I didn't know but he wrote me so continuously about it, came through Nashville here to see me and I happened not to be here, and he has records of his books and his acts, he used the Interstate while he was our competitor, and tried to show by comparison he had saved money by using the Interstate acts, and they were so much better acts, and wrote me a great big long letter, some so long I don't reckon I have ever gone over them all.

Q. I will ask you whether or not you have any of the letters you received from Mr. Albert in regard to your making contracts with the Interstate Amusement Co. if so, will you please file them as Exhibits to your deposition, beginning with Exhibit No. 1 giving the dates, and file each exhibit?

A. I file as exhibit No. 1 letter from Mr. Albert, dated August 19, 1912; another letter dated February 18th, 1912, as exhibit No. 2; as exhibit No. 3 a letter from Mr. Albert showing the cost of acts, the top line of which is headed "Name of Act, dated at Airdome, Salary, date at Majestic, Salary and remarks, I file as exhibit No. 4 letter dated Chattanoga, Tenn. April 15th, 1912, from Mr. Albert and another letter without date, as exhibit No. 5.

Q. I will ask you, Mr. Sperry, whether or not you received other letters from Mr. Albert, urging you to make a contract for your theatre with the Interstate Amusement Co.?

A. I don't know that I received any more than these; at least, I have not put my hands on any others.

Q. I will ask you, besides this, whether or not Mr. Albert talked to you personally and made any representations or inducements as to your making a contract with the Interstate Amusement Co. for your theatres?

A. Well, the night we made the trade, he wanted to insist on his changing, but were not ready to do so and every time he had an opportunity he would say something about it.

Q. I will ask you whether or not largely as the result of Mr. Albert's representations, your company finally made a contract with the complainant, the Interstate Amusement Co.

42 A. I could not tell that; I was impressed with Mr. Albert's sincerity in the matter, but the manager, Mr. Watkins,

changed and notified me that they had changed very suddenly to the Interstate.

Q. I will ask you whether or not as the result of Mr. Albert's writing and seeing you in regard to the Interstate Amusement Co. you felt favorably inclined or otherwise to make contracts with the Interstate Amusement Co.?

A. I felt very favorably towards it, and the only thing that deterred me was my partners owning stock in the Hodkins circuit.

Q. State whether or not these letters received from the defendant Albert addressed to you, in regard to the Interstate Amusement Co. were received by you in due course of mail?

A. Yes sir.

Cross-examination:

I am very well acquainted with Mr. R. M. Watkins, who signs and verifies the answer of the Tennessee Realty and Leasing Co. in this case. Mr. Watkins is a thoroughly reputable gentleman. Any statement he makes under oath, is entitled to full faith and credit, woud be entirely satisfactory to me.

—. Personally, you don't know anything of the details of the present controversy or how the Tennessee Realty and Leasing Co. comes to be interested in it?

A. No, I do not.

*Stipulation.*

It is agreed by all parties, including deft. Albert that the statement filed as Exhibit No. 1 to the bill in this case bears the genuine signature of W. S. Albert defendant?

I believe the Majestic Theatre or rather the Tennessee Realty and Leasing Co. made the contract with Catron & Albert, by which the Airdome performances in Chattanooga ceased and there was a merger with our company on or about or to become effective some time in January, 1912, instead of January, 1911?

We went to Chattanooga in December, 1911, and arranged for it to take effect when our anniversary was up, Jan. 15, 1912.

The fact is, looking to the bill sued on in this case against Albert & Catron it is shown they are not charged with any item after Jan. 8th, 1912, and I will ask you if that is not about the time they quit doing business at the Airdome and the merger occurred?

43

A. I think that was about the time.

Q. Now, when you spoke of the circuit of the Interstate Amusement Co. or the circuit of this supposed company or representative of that company, what do you mean by that Mr. Sperry?

A. Well, these amusement circuits generally have headquarters in a large city, like Chicago or New York or Cincinnati, and we make a contract with those people to furnish us so many acts per week, and they are supposed to continue to furnish us with shows from that point.

Q. Now, that means about this, that the Amusement Co. by whatever name it is known, books particular plays, scenes and actors to appear throughout a section of the country known as a circuit?

A. Yes.

Q. And the custom is really to have a booking company that keeps in touch with the towns which form that circuit and thereby arrange a schedule that will permit of the acts being played in one town to-day, maybe for one or more days and in another town a day or more hence?

A. Yes, that is correct.

Q. Now, what concern is it that actually operates the shows or plays after they are thus booked.

A. Well, of course the local house puts on the acts and they are remitted according to agreement a certain percentage taken out of their salaries, to this headquarter?

Q. Who pays the actors, the players, in cases of this kind?

A. The local house.

Q. And do the players defray their hotel bills and other expenses, while engaged in a town?

A. Yes sir.

Q. And how about the railroad fare to the next town?

A. That is sometimes by agreement paid by houses and sometimes not.

Q. Sometimes the actors themselves pay it?

A. Yes sir.

Q. So really, the function of the booking office or as in this case, the Amusement Co. is to send to the various theatres that are
44 on a circuit throughout the country these players and notify the various theatres that the players will appear on a certain schedule from time to time?

A. Yes, so I understand.

Q. Now, sometimes the booking office contracts with another corporation or person or persons to send actors around these circuits and thus there are two corporations, one a booking corporation which makes the schedule in advance and the other, the operating corporation which sends the actors from time to time to fill these engagements, isn't that true?

A. I never knew of but one concern that did both. I understand the Interstate Amusement Co. has a capital stock and have built five or six houses throughout the country, which they operate independent, but of course off of their own circuit.

Q. Do you know how this business is carried on, for instance from the city of New York, whether the booking corporations there, whether they do anything more than simply arrange the schedules with the theatres constituting a certain circuit or whether they actually in addition to making the schedules, see that the playrights appear on schedule time?

A. I think they have some sort of a guarantee from an act when the act is booked, with them that they will appear where these booking concerns send them.

Q. And just what do you mean by an act?

A. Either a single man as an act, or a team or a big scene, with four or five people.

Q. That is what I am trying to get at, who is it that directs the acts, that is to say, gets the players together, costumes them and sends them around the country?

A. I understand different acts are owned by different people, that costume them and collect them, but we only come in contact with them and we hand over their salaries.

Sometimes I understand the manager collects the salaries, all of the salaries and travels with them and sometimes they do not, each fellow says what he is entitled to, so and so.

Q. It is a fact then, that the booking company and the act
45 are operated by different people, as a rule?

A. I think so, where they are any size.

Q. The Amusement Company, so far as its operations in Tennessee are concerned, has been limited to booking, that is, making contracts or schedules for the appearance of these acts?

A. So far as I know.

Q. Mr. Albert seems to have been rather persistent in urging that the theatres in Nashville and Chattanooga obtain contracts or make bookings with the Interstate Amusement Co. At the time of writing those letters, he was pretty considerably stockholder in the Tennessee Realty & Leasing Co. which operated the Majestic Theatre in Chattanooga, wasn't he?

A. I would not say or call him a stockholder, but he had a profit interest in it, that would be paid to him, quite largely the more money he made the quicker he got his money.

Q. And this last year alone he realized from that interest between two and three thousand dollars, or up to twenty-five hundred dollars, didn't he?

A. Yes.

Q. And of course, if the theatres had made more money he would have gotten yet larger returns?

A. Yes.

Q. So that his zeal in this matter in his endeavor to have contracts made with the Interstate Amusement Co. is accounted for by the fact that he was trying to reap a larger income?

A. Well, I think that probably induced him; he believed in the circuit.

Redirect examination:

Q. Now you spoke of Mr. Albert having drawn nearly three thousand dollars for 1912 out of the Majestic Theatre which was operated by the Tennessee Realty & Leasing Co.?

A. Yes sir.

Q. Isn't it true a large part of this came to him on his contract which was in the nature of the consideration, by which he and Mr. Catron has sold the Airdome to the Majestic Theatre people?

A. Yes sir.

46 Q. So his interest in the business came only by reason of his having stock in the Majestic Theatre, didn't it, except

that he wanted to get his consideration of seventy five hundred dollars paid for his individual interest in the Airdome?

A. Six thousand dollars interest; he was anxious to get settled.

Q. In other words, Mr. Albert has owned fifteen hundred dollars of stock in the Tennessee Realty & Leasing Co. which operates the Majestic?

A. Yes, sir.

Q. And then he owns six thousand dollars in the proceeds or in the contract, which was to be paid to him from the proceeds of the shows?

A. Y-s, sir.

Further this deponent saith not.

H. L. SPERRY,
By BUFORD DUKE,
*Notary Public.*

*Deposition of Tony Sudekum, Filed 6th June,* 1913.

Deposition of TONEY SUDEKUM.

Said witness beint duly sworn deposed as follows:

My name is Tony Sudekum; my age is thirty four years; my resident is Nashville, Tenn.; my occupation is theatrical business.

I am connected with Crescent Amusement Co. We have four theatres.

I am acquainted with Mr. S. Rennee of the Interstate Amusement Co. of Chicago, Ill.

—. I will ask you whether or not you, as the representative of your company negotiated and made a contract with Mr. Rennee as the representative of the Interstate Amusement Co. along in June, 1912.

A. I see he just signed his name there; it is not signed the Interstate Amusement Co. but I was under the impression that he was making it for the Interstate Amusement Co. I don't know how that would be about that. I didn't know he didn't have the interstate Amusement Co. named signed to it until I looked at it there.

Q. Did he represent himself as the representative of the Interstate Amusement Co. of Chicago, Ill?

47 A. I don't know whether that was ever brought up or not, but I supposed he was, all the time.

Q. Whose circuit did he represent to you he represented?

A. Well, the time before that it was the Interstate Amusement Co.; there wasn't anything said about the circuit at the time this letter was written?

Q. I will read this. June 25, 1912. The Crescent Amusement Co. Agrees if they purchase the Princess Theatre, Nashville, Tenn., to continue to book their vaudevill- acts through the Interstate Circuit of Chicago at average cost of six hundred dollars for five acts and the regular form of contract as in vogue on Interstate Circuit at five per cent commissions, for one year from date, unless policy

of house is changed from Vaudeville. I will ask you if on or about June 26th, 1912, the Crescent Amusement Co. of Nashville, Tenn., with which you are connected, made the contract which has just been read to you, with Mr. Renneee, the representatime of the Interstate Amusement Co. of Chicago, Ill?

A. I did.

Q. Will you please file this contract as Exhibit A to this your deposition?

A. I will file a copy of it.

It is agreed that the following is a true and correct copy of said contract and that it may be used with the same force and effect as the original, the same being as folloes to wit:

NASHVILLE, TENN., June 26, 1912.

The Crescent Amusement Co. agrees if they buy the Princess Theatre, Nashville, Tenn., to continue to book their vaudeville acts thought the Interstate Circuit of Chicago, at average cost of $600 for five acts, and the regular form of contract as in vogue on Interstate Circuit, at 5% commissions.

For 1 year from date, unless polict of house is changed from vaudeville.

THE CRESCENT AMUSEMENT CO.
TONY SUDEKUM.

Witness-:
S. RENNEE.
F. P. FURLONG.

48 Cross-examination:

Q. Who wrote this stipulation of June 26th, 1912?

A. I think Mr. Furlong wrote that. That is his name out there. Mr. Furlong was sitting here with Mr. Rennee and he wrote the contract and Rennee signed it.

Q. Now it seems from this paper that the Crescent Amusement Co. was proposing to "book their vaudeville acts through the Interstate Circuit of Chicago." Explain how vaudeville acts are booked through the Interstate Circuit, what is the course?

A. They had a lot of other houses they were booking and we wanted to get on the circuit, at least, they wanted us to get on the circuit so as to have smaller jumps, to keep the railroad fare from being so much from one town to another.

Q. Then, if you notified the Interstate Amusement Co. at its Chicago office that you desired for one of your houses to have shows therein, the bookings of the Amusement Co. the next step would be for you to submit a proposition to the Interstate Company or sign a contract with it of some nature?

A. We have contracts, but I would not submit them any proposition. They would probably be here looking for business.

Q. The point is how did you do it, if you had any contract, how was it made and when and where?

A. The thing is, they were here to see me several different occasions and wanted me to, or wanted Mr. Furlong, the man running the house, trying to get him to do business with him, and never would do it and when the Princess Theatre came up to be sold, they spoke about buying it, and I wanted to buy it myself if I could, so they told me if I would use their acts, they would keep out of it and let me buy it, they didn't want it, but they thought if I bought it, — would not use their acts. Mr. Furlong was not in at that time so I told them no, if I bought it, I intended to use their acts, for Furlong was using Hodkins Acts and that was about the only two circuits that could be got down here and when we bought that I would take their acts and that was the agreement, if I did buy it, I would use their acts.

Q. And you made that about June, 1912?

A. Yes, that is what that says.

49 Q. That is all you have to go by?

A. Yes.

Q. And did you buy the Princess Theatre?

A. Yes.

Q. And you did use the Interstate Amusement Co.'s acts?

A. Yes.

Q. And now in doing that, who paid the actors, that is the persons who travel in troupes and entertain the public?

A. We do.

Q. You pay the various performers, is that right?

A. Yes, sir.

Q. And how do you remit to or settle with the company that books them for you, the Interstate Amusement Co?

A. Deduct it from the acts salary, and sent it to the Interstate Amusement Co. at Chicago.

Q. In other words, your local company, which is strictly a local concern, operates the house and it permits exhibitions therein that are booked by the Interstate Amusement Co. in Chicago, and collects at the door for entrance fees and keeps part of the income, pays the players part of it, and also pays the Interstate Amusement company a part by way of commissions or contract agreement, is that the way it is done.

A. Sometimes don't keep part of it; sometimes have to add part of it to it.

Q. But, that is presumed to be the scheme?

A. We pay the salaries, of course if there is any profit there we keep it.

Q. Your company is a local company, the theatre is not operated by the Interstate Amusement Co. at all?

A. No, sir.

Q. The fact is, the business of the Interstate Amusement Company is hereby to make bookings?

A. Agents there in Chicago is about what you would say.

Q. They are an agency force or a go between?

A. Yes, I don't do business with them any more; have not for some time.

50 Q. But when you did do the business, they were, as you say, sort of agents or go between the players and the play houses?
A. Yes, sir.

Redirect examination:

Q. Did anyone else of the Interstate Amusement Co. come to see you or your associates in regard to making the contract?
A. I think Mr. Chauteau was here to see Mr. Furlong.
Q. In regard to making the contract?
A. Yes, trying to get him to make one.
Q. You say they, meaning the Interstate Amusement Co. represented that if you purchased the Princess and did not use the bookings of the Interstate Amusement Company, they would build a theatre. Whom did you mean by they?
A. No, they didn't say that would build one. They said if they were positive we would not use the Interstate Amusement Company's Circuit at the Princess Theatre, they would buy the Princess Theatre themselves, as it was for sale at that time.
Q. Who made those representations?
A. -r. Rennee.
Q. Did he make them here in Nashville, Tenn?
A. Yes, all of that was here; the only thing the Interstate Amusement Co. wanted at Nashville, was a place to use their acts.
Q. I will ask you, if pursuance of this contract which has just been exhibited here, a copy of which has been filed with your deposition, you went on and purchased the Princess and used the bookings of the Interstate Amusement Company of Chicago?
A. Yes, sir.
Q. And paid them the percentage?
A. Yes.
Q. And this is the contract upon which you operated?
A. Yes, sir.

*Notary Public.*

Further this deponent saith not.

TONY SUDEKUM,
By BUFORD DUKE,

51 (On envelope.)

After 5 days return to
Will S. Albert
Albion View, Tenn.

(Post Mark)
Albion View
Aug.
20
P. M.
1912
Tenn.

(Stamp)

Mr. H. L. Sperry,
Tennessee Realty & Leasing Co.,
Nadhville, Tenn.

5th Ave. Theatre Building.

Catron & Albert
Proprietors.

Airdome
Theatre

Will S. Albert
Manager.

Ninth and Broad Streets.

High Class Vaudeville.

Interstate Amusement Company (Members of W. M. M.'s Association), Booking Agents.

ALBION VIEW, TENN., Aug. 19th, 1912.

Mr. H. L. Sperry, Nashville, Tenn.

MY DEAR MR. SPERRY: In conversation over the phone this morning, Mr. Catron told me of your recent visit to Chattanooga, and I regret sincerely not having seen you. Had I known of your contemplated visit I would have come down from the ridge to have been with you to discuss matters of mutual interest. Having nothing in particular to take me to the city except about once a month on business, I stay up here keeping out of the summer heat. I intended writing you some months ago, yet I hesitated for fear you would think I am always kicking about something, but since Mr. Catron told me you expect us to look after your interests here, which at the same time are our interests, I will unburden myself to you as well as I am able in a letter. You wrote me some months ago to "leave well enough alone" and that is why I have kept my counsel to myself, but there were many things I wanted to talk to you about.

52 In the first place, since all the theatres have been closed, the receipts at the Majestic should have been larger on a weekly average of from $100.00 to 200.00 than they have shown by the statements. I am not saying this off-hand, but by a comparison of receipts as done by the Airdome when it was the only place of amusement in the city during the summer months. If the Majestic had given the public the proper class of attractions, the kind the public seek and demand, it would easily have earned the additional revenue I have mentioned.

You can prove this assertion by consulting your statements the weeks Rex Comedy Circus and Schoeu's Rough House Kids (Both Airdome Acts) broke your previous records, the latter in a down pour of rain all week, still you lack nearly $200.00 reaching the Airdome record with Harry Fields School Kids. This excess in receipts I attribute to the patronage of the best class of theatre goers who regularly attended the Airdome, and which the Majestic only gets occasionally after the news has spread about town that the Majestic has "an exceptional strong bill etc."

If, without prejudice, you will look at this you will of course know that the Airdome put on a superior grade of attractions week in and week out as compared to the Majestic shows, and it was this very thing and the class of patronage it drew to the Airdome that enabled us to make money even though oppoesd by a new and pretty theatre located in the heart of the best shopping district of Chattanooga. Speaking candidly and frankly, as I feel I should do since now we are together interested in one common cause, I do not believe there is a man connected with the Hodkins Booking Agency with the executive ability capable of putting together a first class vaudeville show for two or more consecutive weeks, or if he is competent he is either very lax in his methods or don't give a continental d— what kind of a bill he sends his clients. Another thing deficient in the Hodkins office is the lack of availability to acts
53 of the first calibre. When occasionally they do land one of first class ability it is either through attempting salary bait or is an act that has worn out its usefulness on the more prominent circuits and seeks the cheaper agency for means of support. Now here also lies the "RUB."

I have looked back over my files and have copied from same for your benefit, a list of all acts that have played both the Airdome and Majestic theatres with dates, salaries, paid, remarks etc. It is worth careful study and clearly shows that Hodkins pays more for his acts than the Interstate paid them, even though repeating with them in a town a year or more later. As you well know an act that has played an opposition house previously loses in value and should play for less money especially a circuit that is looked upon by the performer as a cheaper circuit. In my case I would absolutely refuse to play an act that had played the opposition a few months before. But in that case what would Hodkins do for acts? He must take what he can get and has no choice. I have paid some clever teams $125.00 and even a few $150.00 but they were really feature acts and town talk. But Hodkins gives you weekly 90.00 to 100.00 teams that might as well be left off the bill as far as drawing power is concerned or to add to the box office receipts. In the same way I may compare singles to whom I have paid as much as $75.00 and incidently I might add they were real acts but what does Hodkins give you for $50.00 and $60.00 that is worth mentioning? I could go on indefinitely pointing out the overpaid values that Hodkins is paying for inferior material, but what's the use?

Your local manager, Mr. Russell should tell you these things, but as he is an ally of the Hodkins office, also interested to the

extent of 25% of the profits in the Hodkins Booking Agency, and no doubt owes his present job as manager of the Majestic to Mr. Hodkins' influence, it would be ungrateful and disloyal on
54 his (Russell's) part to show up the blunders of his superior, conceding of course that he knew the difference himself.

Mr. Hodkins is wise in recommending his lieutenants for the position of local manager in new houses that he secures the bookings of, especially when the theatres are erected by laymen. These managers are usually more alert to Hodkins' interests than to those who employ them. I can cite a number of instances to prove this assertion not only here but by your Nashville manager as well.

I will also state that the present fixed expenses of the Majestic are too high and that with proper economy, a cut of approximately $1,500.00 per year could be made without impairing or lessening its efficiency. This suggestion does not effect Russell's nor Watkins' salary. As you know when Well's opens the Lyric he will play a higher grade of vaudeville than is put on at the Majestic under your present booking arrangement and whereas it may not effect the Majestic receipts for the first few weeks, yet when the public finds out what the Lyric is offering in the way of superior acts they will surely go there, notwithstanding it is an antiquated play-house and unfit for use. With the small seating capacity of the Lyric I do not believe Wells can make any money, but he can prevent the Majestic from making any, unless its shows are materially strengthened to bear favorable comparison to his. As I said in the earlier part of this letter, this was the reason the Airdome did business right along after the Majestic opened, although not making any big money yet preventing you also from doing so by dividing up the business in a town the size of Chattanooga.

Another thing will be in Mr. Wells' favor, the Times will laud to the skies anything presented at the Lyric, and you will not be able to depend on Hodkins' Press Bureau way off in Chicago to favorably look after your interests. If I were to counsel you I
55 would suggest that the week the Lyric opens, or even one or two weeks prior, to put on as strong a Five Act Bill (not quantity but quality) as could be secured from anywhere and when the public see you are giving as good a show as the other fellow they will remain loyal but when not so it will be different. If Wells sees he is making no inroads on your patronage and that he is only losing money week after week, he will soon be ready to quit, but as long as he things he is crippling your business and by continuing may eventually be able to frame up a deal with you (he has always been very ambitious to alone control the entire Southern theatrical situation) he will continue even though losing money.

I am not informed if either you or Mr. Watkins are looking ahead to secure any other booking franchise, but if so would advise you to be careful before signing a contract.

Last December the Western Vaudeville Managers Asso. and United Booking Officers of America renewed their territorial agreement for twenty-five years, and as I understand it the new division line runs from New Orleans to Memphis, thence to Chicago. All territory

East of this line belongs to the U. B. O. all West to the W. V. M. Ass'n. This agreement may not effect houses that have been previous to this time receiving its bookings from either agency, but in case of a new house or an old one making a change in its bookings the rule may apply. Either the interstate (W. V. M. Ass'n) or U. B. O. (family dep't) can furnish equally as good attractions in this territory but I would only sign with the agency who would give me a guaranteed franchise, securing me from opposition bookings by the other agency. These are the only two concerns amounting to anything in the South or having any houses, as neither Pantages, Sullivan-Considine nor Theatrical Booking Corporation have anything in this territory nor could these last three prevent opposition.

It was the contract I had with the Interstate by which I successfully fought Wells when he put "Keith" Vaudeville in the Lyric and I also stopped the Majestic using the word "Keith" in its advertisements and on the bill boards, although I don't
56 suppose Russell knows who did it.

I haven't seen a vaudeville show in about ten weeks but it disgusts me to read the Majestic's ads. To see nothing but Jap troupes and acrobats, sometimes three and four silent acts on a five act bill with no comedy. The Majestic has played more Jap troupes in six months than I played in five years at the Arpheum and Airdome combined. They are all similar.

Warmest regards and exceeding regret that I missed you.

The next time you come to Chattanooga drop me a line in advance to Albion View and I will come down to meet you. Trust I have made myself clear, if not ask me and I will be pleased to explain.

Very truly yours,
(Signed) WILL S. ALBERT.

57 On envelope.

After 5 days return to
W. S. Albert
Albion View, Tenn.

Post Mark
Albion View
Jan. 9
1913
Tenn.

Stamp

Mr. H. L. Sperry,
Nashville, Tenn.

Pdt. Tenn. Realty & Leasing Co.

(Regular stationery as previous letter.)

CHATTANOOGA, TENN., Feb. 18, 1912.

Mr. H. L. Sperry, c/o 5th Ave. Theatre Bldg., Nashville, Tenn.

DEAR MR. SPERRY: Could you give me an idea of when you will call a directors' meeting of the Tenn. Realty & Leasing Co. or when you will get over here again?

When the meeting takes place I wish to address a letter to you to read at the meeting and if I cannot carry out every promise I make then it is up to me to make good. I do not care to write in this letter many things I have to say to you should I be able to have a private interview on your next visit.

My deductions are made from the last four weekly statements I have received.

Yours truly,

(Signed) WILL S. ALBERT,
*c/o Airdome.*

58 On envelope.

After 5 days return to
Will S. Albert
Albion View, Tenn.

Post Mark
Albion View
Apl
9
1913
Tenn.

Stamp

Mr. H. L. Sperry,
Nashville, Tenn.

Tenn. Realty & Leasing Co., 5th Ave. Theatre Bldg.

| Name of act. | Date of Airdome. | Salary. | Date at Majestic | Salary. | |
|---|---|---|---|---|---|
| | | | 1912. | | |
| Haley Trio | 4/11/11 | 90.00 | Jan. 15 | 140.00 | |
| Rex Comedy Circus | 3/20/11 | 200.00 | Feb. 26 | 275.00 | |
| LaMothes Comiques | 5/17/09 | 125.00 | Mar. 4 | 160.00 | |
| Valoise Brs. & Melrose | 4/11/11 | 90.00 | Apl. 1 | 150.00 | |
| George Cratty | 1/31/10 | 55.00 | " 8 | 60.00 | |
| Windsor Four | 7/24/11 | 125.00 | " 29 | 225.00 | |
| Aldro & Mitchell | 6/19/11 | 85.00 | June 17 | 90.00 | |
| Nifty Girls | 10/2/11 | 85.00 | July 22 | 100.00 | |
| Musical Stipps | 11/29/09 | 70.00 | " " | 90.00 | |
| Rizal & Atima | 6/28/09 | 80.00 | " 29 | 90.00 | |
| Nelson, Nichols & Nelson | 4/25/10 | 125.00 | ——— | ——— | 3 people |
| Nelso-Nichols Temple | 10/9/11 | 175.00 | July 29 | 200.00 | 5 " |
| Above this line the Majestic paid higher salaries than the Airdome, Below vice versa. (Compare.) | | | | | |
| Fred Hamill & Musical Kids | 1/16/11 | 150.00 | Jan. 29 | 105.00 | |
| Bessie Leonard | 5/23/11 | 85.00 | Feb. 26 | 60.00 | |
| Chester & Grace | 7/26/11 | 110.00 | Apl. 1 | 90.00 | |
| Farly & Prescot | 10/18/09 | 100.00 | " 8 | 90.00 | |
| Trolly Car Trio | 8/22/10 | 150.00 | " 8 | 140.00 | |
| Elona The Squa Girl | 6/28/09 | 75.00 | May 6 | 60.00 | |
| Schoens Rough House Kids | 12/25/11 | 210.00 | June 24 | 200.00 | |

THIS PAGE IS BOUND VERTICAL IN BOOK

*Remarks.*

First act: When playing the Airdome this act was a team, Haley & Haley.

Fourth act: When at Airdome was team Valoise Bros.

Sixth Act: Trio at Airdome. Majestic paid just $100.00 more for this piano player who didn't add a thing to the act.

First act below line: At the Airdome it was a trio. On the weekly statement Fred. Hamill's salar*t* was put down as $105.00 although Hamill told me during a conversation he only received $100. net at the Majestic and I have a letter from him since this conversation now in my possession reiterating this statement. Mr. Russell no doubt charged the extra $5.00 so that Mr. Hodkins would get his commission, although Hodkins was not entitled to any commission under the circumstances. The stockholders have to pay commissions out of their receipts. It is to laugh.

For Quartettes the Airdome has never paid more than $200. and this only about twice, all others were $175. For Harry Fields and school kids (9 people) $325. twice and $300. the third time. Gus Sims' Minstrels (10 people doing 4 separate acts) $450. What bookings is the cheaper? Compare without prejudice. These figures are from the books.)

59

On Envelope.

Airdome
Theatre
Will S. Albert, Mgr.
Chattanooga, Tenn.

Chattanooga
April 13
1 P M
1912

Stamps

Mr. H. L. Sperry,
218 —5th Ave. North,
Nashville, Tenn.

Tenn. Trust Co.

(Usual Airdome stationery)

CHATTANOOGA, TENN., April 15, '12.

Mr. H. L. Sperry, 218 5th Ave. North, Nashville, Tenn.

MY DEAR MR. SPERRY: Yours of 11th inst. received.

I also regretted the fact of not being able to see you in Nashville on my return from Chicago, as it was for this very purpose that I stopped off there.

As you know it seems almost an impossibility to have a private interview with you when in Chattanooga, unless you should care to have me meet you at the train on your arrival the next time you come, and possibly we can get a half hour's conversation without others being present.

I have a lot to say to you that I am sure will interest you, and I can back up everything and every statement I make.

Let me hear from you. With warmest regards.

Very truly yours,

WILL S. ALBERT.

4—361

60 (Usual stationery.)

CHATTANOOGA, TENN.

MY DEAR MR. SPERRY:

Turn over this page and you will find the cost of Airdome shows from the date the Majestic opened Jan. 16, 1911 until the Airdome closed Jan. 13, 1912. This is a true report the figures taken from my books and if you or anyone else doubts the truthfulness of my figures I have the commission slips from the Interstate to prove it. You will see as I have always contended that the Interstate acts cost less than Hodkins' junk.

On the margin of Miss Bloom's letter I have copies cost of Majestic bills and this you must note is at a time when the Majestic is the only Vaudeville house in the field. If you will average up the bills right along for a year I believe the Interstate bills would cost less and oh! my what a difference in "quality". Please return Miss Bloom's letter when you have finished with it. I am only sending this to you to let you see that already last February and even earlier I was working for the benefit of the Majestic in procuring good shows at a minimum cost, but when I saw how determined certain persons were to continue with the Hodkins crowd because of individual gain, I got thoroughly disgusted and dropped the matter. If I had been listened to I believe in my heart the Tenn. Realty & Leasing Co. would now be in the neighborhood of $5000. more profits.

Yours truly,
(Signed) WILL S. ALBERT. (Over)

61 *Cost of Airdome Bills from Jan.* 15, 1911, *to Jan.* 13, 1912.

This was at a time we were strengthening our shows to oppose the Majestic which had just opened. After few weeks went back to regular bills.

| 1911. | | 1911. | |
|---|---|---|---|
| 1/16 | $610.00 | 7/31 | 485.00 |
| 1/23 | 545.00 | 8/7 | 440.00 |
| 1/30 | 510.00 | 8/14 | 485.00 |
| 2/6 | 650.00 | 8/21 | 470.00 |
| 2/13 | 655.00 | 8/28 | 505.00 |
| 2/20 | 675.00 | 9/4 | 505.00 |
| 2/27 | 510.00 | 9/11 | 530.00 |
| 3/6 | 505.00 | 9/18 | 530.00 |
| 3/13 | 625.00 | 9/25 | 520.00 |
| 3/20 | 630.00 | 10/2 | 500.00 |
| 3/27 | 670.00 | 10/9 | 575.00 |
| 4/3 | 600.00 | 10/16 | 550.00 |
| 4/10 | 535.00 | 10/23 | 495.00 |
| 4/17 | 560.00 | 10/30 | 510.00 |
| 4/24 | 575.00 | 11/6 | 555.00 |
| 5/1 | 685.00 | 11/13 | 525.00 |

| | | | |
|---|---|---|---|
| 5/8 | 520.00 | 11/20 | 545.00 |
| 5/15 | 585.00 | 11/27 | 590.00 |
| 5/22 | 530.00 | 12/4 | 540.00 |
| 5/29 | 575.00 | 12/11 | 540.00 |
| 6/5 | 530.00 | 12/18 | 585.00 |
| 6/12 | 570.00 | 12/25 | 585.00 |
| 6/19 | 484.00 | 1912. | |
| 6/26 | 505.00 | 1/1 | 535.00 |
| 7/3 | 525.00 | 1/8 | 585.00 |
| 7/10 | 460.00 | | |
| 7/17 | 455.00 | | |
| 7/24 | 440.00 | | |

62 SPERRY EXHIBIT.

63 No. 13637.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

*Stipulation.*

It is agreed that the attached certified copy of the Articles of Incorporation, etc., of the Interstate Amusement Company, the Complainant herein, may be used and treated as evidence in the cause, subject to exceptions for incompetency and irrelevancy only but not subject to exception because not filed in time.

(Signed) W. B. MILLER,
*Solicitor for Complainant.*

(Signed) JOE W. WILLIAMS,
*Solicitor for Deft. Albert.*

64 STATE OF TENNESSEE,
*Department of State:*

To all to whom these presents shall come:

I, Cornelius Roach, Secretary of State of the State of Missouri and Keeper of the Great Seal thereof, hereby certify that the annexed pages contain a full, true and complete copy of Articles of Incorporation in re Interstate Amusement Company, filed April 28, 1905; Certificate of Incorporation issued thereon, April 28, 1905; Statement of Increase of Capital Stock from $180,000 to $230,000, filed February 23, 1906; Certificate issued thereon February 23, 1906; Affidavit of Increase in Number of Directors from Five (5) to Seven (7) filed August 30, 1910; Affidavit of Decrease in Number of Directors from Seven (7) to Five (5) filed April 20, 1912, as the same appears on file and of record in this office.

In Testimony whereof, I hereunto set my hand and affix the Great

Seal of the State of Missouri. Done at the City of Jeff-son, this Eighteenth day of June, A. D. Nineteen hundred and thirteen.

[SEAL.] CORNELIUS ROACH,
*Secretary of State.*
FRED G. PARK,
*Chief Clerk.*

65 *Articles of Association of the Interstate Amusement Company.*

We, the persons whose names are subscribed hereto, do hereby associate ourselves together for the purpose of forming a corporation under the provisions of Article 9 of Chapter XII of the Revised Statutes of Missouri, 1899, in the manner following, to-wit:

1st. The name of the Corporation proposed and hereby established shall be the

"Interstate Amusement Company."

2nd. The principal office of the Corporation shall be located in the City of St. Louis.

3rd. The amount of the Capital Stock of this Company shall be one hundred and eighty thousand ($180,000.00) dollars, divided into Eighteen hundred (1,800) shares of the par value of One Hundred ($100.00) dollars each, of which Sixty Thousand ($60,000.00) dollars, shall be preferred stock; that all thereof has been subscribed, and one-half (½) thereof actually paid up in lawful money of the United States, and is now in the custody of the persons hereinafter named as the first Board of Directors, the said preferred stock shall have preference and priority over the common stock in the following particulars, to wit: that each installment of preferred stock shall bear interest, payable out of the net earnings of said Company, at the rate of seven (7%) per cent per annum, from the date of the payment of the respective instalments into the Treasury of said Company, and until said installments are redeemed from the net earnings of said Company in the manner as may be provided in the by-laws; and on the dissolution of said Company, voluntary or otherwise, all unredeemed preferred stock at the time of any such dissolution, shall, in the distribution of the net assets of said company have a preference over the common stock in this: The preferred stock shall first participate in the net assets of said Company to the extent of one hundred (100)
66 per cent of the amount actually paid on said stock, into the Treasury of the Company, and unredeemed at the time of any dissolution; and the residue of said net assets shall be divided pro rata among the holders of the Common Stock; said preferred stock shall be subject to redemption in the manner provided for in the by-laws of said Company.

4th. The names and places of residence of the several stockholders and the number of shares of stock, both common and preferred, subscribed by each, are as follows:

Common Stock.

| Name. | Residence. | No. of shares. |
|---|---|---|
| H. F. McGarvie | St. Louis, Mo | 240 |
| R. E. Ricksen | St. Louis, Mo | 240 |
| Karl Hoblitzelle | St. Louis, Mo | 240 |
| T. R. MacMechen | St. Louis, Mo | 240 |
| Edw. F. Carruthers | St. Louis, Mo | 240 |

Preferred Stock.

| | | |
|---|---|---|
| George K. Hoblitzelle | St. Louis, Mo | 100 |
| Edw. F. Carruthers | St. Louis, Mo | 74 |
| H. F. McGarvie | St. Louis, Mo | 74 |
| T. R. MacMechen | St. Louis, Mo | 74 |
| R. E. Rickson | St. Louis, Mo | 74 |
| John W. Harrison | St. Louis, Mo | 50 |
| Ront. Holmes | St. Louis, Mo | 20 |
| Karl Hoblitzelle | St. Louis, Mo | 74 |
| E. A. Bayrd | St. Louis, Mo | 50 |
| B. P. Williams | St. Louis, Mo | 10 |

5th. That the Board of Directors shall consist of five (5) members and the names of those agreed upon for the first year are as follows:

| | |
|---|---|
| George K. Hoblitzelle | St. Louis, Mo. |
| Robert Holmes | " " " |
| H. T. McGarvie | " " " |
| Edw. F. Carruthers | " " " |
| E. A. Bayrd | " " " |

6th. The corporation hereby proposed and established shall continue for a period of fifty (50) years.

7th. The purposes of the Corporation hereby proposed and established are as follows: To conduct and operate a general theatrical and amusement business.

8th. That the date of the first meeting of the Stockholders of said corporation shall be on the second day of May, 1905.

67 In witness whereof, the parties hereto have hereunto set their hands *and seal* this twenty-sixth day of April, A. D. 1905.

B. P. WILLIAMS.
E. A. BAYRD.
GEO. K. HOBLITZELLE.
H. F. McGARVIE.
R. E. RICKSEN.
THOS. R. MacMECHAN.
E. F. CARRUTHERS.
KARL HOBLITZELLE.
JOHN W. HARRISON.
ROBERT HOLMES.

STATE OF MISSOURI,
*City of St. Louis, ss:*

Personally appeared before me Everett H. Smith, a Notary Public, within and for the City of St. Louis, this 26th day of April, A. D. 1905, George K. Hoblitzelle, Edw. F. Carruthers, H. F. McGarvie, T. R. MacMechen, R. E. Ricksen, Robt. Holmes, A. E. Bayrd, Karl Hoblitzelle, John W. Harrison and B. P. Williams, to me known to be the persons described in and who executed the foregoing instrument of writing, and acknowledged that they executed the same as their free act and deed.

In Witness Whereof, I have subscribed and set my hand and seal the day and year first above written.

EVERETT H. SMITH,
*Notary Public.*

[Copy of Seal. Everett H. Smith, Notary Public, City of St. Louis, Mo.]

My commission expires on the 23 day of Jan'y, 1909.

Filed & Recorded April 27" 1905 at 2:16 P. M.—Paul Young, Jr. Recorder.

STATE OF MISSOURI,
*City of St. Louis, ss:*

I, the undersigned, Recorder of Deeds for said City and State, do hereby certify the foregoing to be a true copy of the Articles of Incorporation of the "Interstate Amusement Company, together with the acknowledgement, date of filing and recording
68 thereof, as the same remains of record in my office in Corporation Book 30, page 50.

In Witness Whereof, I have hereunto set my hand and official seal this 27th day of April, A. D. 1905.

[SEAL] PAUL YOUNG, JR., *Recorder.*

Filed and certificate of incorporation issued April 28, 1905.

JNO. E. SWANGER,
*Secretary of State.*

69 No. 18294.

*Certificate of Incorporation.*

Whereas, An association organized under the name of

Interstate Amusement Company

has filed in the office of the Secretary of State, Articles of Association or Agreement in writing, as provided by law, and has in all respects complied with the requirements of law governing the formation of Private Corporations for

Manufacturing and Business Purposes.

Now, therefore, I, John E. Swanger, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said Association has, on the date hereof, become a body corporate, duly organized, under the name of

Interstate Amusement Company

located at St. Louis, and is entitled to all the rights and privileges granted to Manufacturing and Business Corporations under the laws of this State for a term of fifty years; and that the amount of the Capital Stock of said Corporation is One Hundred and Eighty Thousand Dollars.

In testimony whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, This 28th day of April, A. S. Nineteen Hundred and Five.

JOHN E. SWANGER,
[SEAL.] *Secretary of State.*

70 Be it known That on the fifteenth day of January A. D. 1906 a meeting of the stockholders of the Interstate Amusement Company was held at the office of the said Company in the City of St. Louis, State of Missouri, for the purpose of increasing the capital stock of said company.

That at said meeting there were present in person and by proxy all of the stockholders holding the full value of all the shares of stock of said company; that said stockholders, and each of them then and there executed an instrument in writing whereby they waived notice of said meeting and consented that the same shall be held at the time and place mentioned and for the purposes above mentioned.

That said meeting was organized by choosing Geo. K. Hoblitzelle, a director in said company Chairman, and Karl Hoblitzelle, Secretary thereof.

That a proposition was then and there submitted to increase the Capital Stock of said Company from One Hundred and Eighty Thousand ($180,000) dollars to Two Hundred and Thirty Thousand ($230,000), — and upon canvassing the vote thereon, it appeared that all of the stock of said Company had been voted in favor of such increase.

That a proposition was also then and there submitted that Twenty Five Thousand ($25,000) dollars of such increased Capital Stock, or two hundred and fifty (250) shares thereof of the par value of One Hundred ($100) dollars each, should be preferred stock, and the remaining twenty five thousand ($25,000) dollars of such increased capital stock or two hundred and fifty (250) shares thereof of the par value of One Hundred ($100) Dollars each, should be Common Stock; that said preferred stock shall have a preference and priority over the said Common Stock, in the following particulars, towit:

That each installment of said preferred stock shall bear interest

payable out of the net earnings of the company at the rate of seven (7%) per cent. per annum from the date of the payment of
71 the respective installments into the treasury of said company and until said installments are redeemed from the net earnings of said Company in the manner as may be provided for in the By-laws; and on the dis-olution of said company voluntary or otherwise all unredeemed preferred stock at the time of any such dissolution shall in the distribution of the net assets of the company have a preference and priority over the common stock in this:

The preferred stock shall first participate in the net assets of said company to the extent of one hundred (100%) per cent of the amount actually paid on said stock into the treasury of the company and unredeemed at the time of dissolution; and the residue of said net assets shall be divided pro rata among the holders of the Common Stock; but no redemption of said preferred stock shall be made until the Company is legally authorized to decrease its capital stock in the manner as required by the laws of the State of Missouri then in force.

And upon canvassing the vote thereon it appeared that all of the stock of said Company had been voted in favor of issuing said increased Capital Stock in the manner and in the amount and number of shares and the price per share of such Preferred Stock and such Common Stock and the preferences and priorities and character thereof and the rate of dividend to be paid thereon, as above set forth.

The present amount of the Capital Stock of said Company, paid up is one Hundred and Eighty Thousand ($180,000) dollars; the amount of the assets of said Company is 190,561 72/100 dollars, the amount of its liabilities is 11,911 72/100 dollars; and the amount to which the Capital Stock of said Company is increased is Two Hundred and Thirty Thousand ($230,000) dollars.

That all of said increase of Capital Stock has been subscribed for, and fifty (50%) per cent. of said increase of Capital has been actually paid up in lawful money of the United States and is in the hands of the Board of Directors of said Company.

72 GEO. K. HOBLITZELL, *Chairman.*

Attest:

[Copy of Seal Interstate Amusement Company, St. Louis, Mo., Incorporated.]

KARL HOBLITZELL, *Secretary.*

Geo. K. Hoblitzelle, Chairman, being duly sworn, says the matters and things set forth in the foregoing statement are true.

GEO. K. HOBLITZELLE, *Chairman.*

Subscribed and sworn to before me this 16th day of February, 1906. My commission expires on the 19th day of July, 1909.

[Seal Jane B. Campbell, Notary Public, City of St. Louis.]

JANE B. CAMPBELL,
*Notary Public, City of St. Louis, Mo.*

STATE OF MISSOURI,
*City of St. Louis, ss:*

On this 16th day of February, 1906, before me personally appeared Geo. K. Hoblitzelle and Karl Hoblitzelle to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed. Witness my hand and seal the day and date last aforesaid. My commission expires on the 19th day of July, 1909.

[Copy of Seal Jane B. Campbell, Notary Public, City of St. Louis, Mo.]

JANE B. CAMPBELL,
*Notary Public, City of St. Louis, Mo.*

Filed & Recorded February 19th, 1906, at 10:13 A. M.
PAUL YOUNG, JR., *Recorder.*

STATE OF MISSOURI,
*City of St. Louis, ss:*

I, the undersigned, Recorder of Deeds for said City and State do hereby certify the foregoing to be a true copy of the statement of the increase of the Capital Stock of the Interstate Amusement Company together with the acknowledgment, date of filing and recording thereof, as the same remains of record in my office in
73 Corp. Book 28, page 473.

Witness my hand and official seal this 19th day of February, A. D. 1906.

[SEAL.] PAUL YOUNG, JR., *Recorder.*

Filed and Certificate Issued, February 23, 1906. John E. Swanger, Secretary of State.

74 STATE OF MISSOURI,
*Department of State.*

#18294.

Whereas, on the 23rd day of February, Nineteen Hundred and Six, there was filed in the office of the Secretary of State, as required by law, a duly certified copy of the statement of the proceedings of a meeting held for the purpose of increasing the Capital Stock of Interstate Amusement Company a corporation organized and existing under the laws of the State of Missouri, and said corporation having, in all things, complied with the law made and provided for the increase of capital stock and increased its capital stock from One Hundred and Eighty Thousand Dollars to Two Hundred and Thirty Thousand Dollars.

Now, therefore, I, John E. Swanger, Secretary of State of the State of Missouri in virtue and by authority of law, do hereby certify that the capital stock of said corporation is increased and

that the amount of the capital stock of said Interstate Amusement Company is Two Hundred and Thirty Thousand Dollars.

In testimony whereof, I hereunto set my hand and affix the Great Seal of the State of Missouri. Done at the City of Jefferson, this 23rd day of February, A. D. 1906.

[SEAL.] JOHN E. SWANGER,
*Secretary of State.*

75 STATE OF MISSOURI,
*City of St. Louis, ss:*

Karl Hoblitzelle, President of the Interstate Amusement Company, a corporation duly incorporated under the laws of the State of Missouri, being duly sworn upon his oath states; that a- a meeting of the stockholders of said corporation, duly called and held on the 25th day of August, A. D. 1910, the number of Directors of said corporation, was by a vote of its said stockholders cast as its by-laws direct, changed from five directors, to seven directors.

KARL HOBLITZELLE, *President.*

Subscribed and sworn to before me this 26th day of August, A. D. 1910.

[SEAL.] MAUD BERKTOLD,
*Notary Public City of St. Louis, State of Mo.*

My term expires March 28, 1913.

Filed for Record Aug. 26, 1910, at 4:45 o'clock P. M. Corp. Book 41, Page 126. Chas. F. Joy, Recorder.

STATE OF MISSOURI,
*City of St. Louis, ss:*

I, the undersigned, Recorder of Deeds for said City and State, do hereby certify that the foregoing instrument of writing was filed for record in my office on the 26th day of Aug. A. D. 1910, at 4:45 o'clock P. M. and is truly recorded in Corp. Book 41, Page 126.

Witness my hand and official seal on the day and year aforesaid.

[SEAL.] CHAS. F. JOY, *Recorder.*

Filed and Copy Issued Aug. 30, 1910. Cornelius Roach, Secretary of State.

76 STATE OF MISSOURI,
*City of St. Louis, ss:*

Ben P. Williams, Secretary of the Interstate Amusement Company, a corporation duly incorporated under the laws of the State of Missouri, being duly sworn upon his oath states that at a meeting of the stockholders of said corporation duly called and held on the 5th day of March, 1912, the number of directors of said corporation

was by vote of its said stockholders, cast as its by-laws direct, changed from seven to five.

BEN P. WILLIAMS, *Secretary.*

Subscribed and sworn to before me, a notary public within and for the City of St. Louis, Missouri, this 18th day of April, 1912.

Witness my hand and notarial seal the day and year last above written. My term expires Sept. 20, 1915.

[Copy of Seal Douglas H. Jones, Notary Public, City of St. Louis, Mo. Com. Expires Sept. 20, 1915.]

DOUGLAS H. JONES,
*Notary Public.*

Filed and Recorded Apl. 18th, 1912, at 11:16 A. M. Chas. F. Joy, Recorder.

STATE OF MISSOURI,
*City of St. Louis, ss:*

I, the undersigned, Recorder of Deeds for said City and State do hereby certify the foregoing to be a true copy of statement of Decrease of Number of Directors of Interstate Amusement Company from seven to five, together with the affidavit and date of filing and recording thereof as the same remains of record in my office in Corporation Book 43, page 559.

Witness my hand and official seal this 18th day of April A. D. 1912.

[SEAL.] CHAS. F. JOY, *Recorder.*

Filed and Copy Issued Ap'l 20, 1912. Cornelius Roach, Secretary of State.

77 *Stipulation of Counsel.*

No. 13637.

INTERSTATE AMUSEMENT CO.
VS.
W. S. SLBERT et al.

Filed July 7, 1913. Sam Erwin, C. & M.; P. E. Williams, D. C. & M.

78 *Original Contract Filed 5th August,* 1913.

This contract made and entered into this Twenty fourth day of May, 1909, by and between the Interstate Amusement Company, a member of the Western Vaudeville Managers Association of Chicago, Illinois, through B. S. Muckenfuss, Booking Manager, hereinafter styled Agent, and Catron & Albert, Proprietors and Man-

agers of the Airdome Theatre of Chattanooga, Tenn., hereinafter styled, Theatre Owner, Witnesseth:

1. The Agent agrees to engage and book the necessary acts for the Theatre Owner for a period of five years, beginning May 17th, 1909. The number of acts each week not to exceed five, and the cost of the said three, four or five acts each week not to exceed an average of Four Hundred and fifty ($450.00) per week.

2. The Booking Fee will be Ten ($10.00) per week, and will only be charged during the period from September 15th to May 15th of each year.

3. The said Agent agrees to bind himself not to supply any other amusement place in Chattanooga during the life of this contract without the written consent of said Theatre Owner.

4. The Theatre Owner binds himself to remit promptly on Monday of each week to the office of said Agent in Chicago, Illinois, a commission of 5% from the salary of act furnished said Theatre Owner by said Agent, and the booking fee above referred to during the period same is payable.

5. It is agreed that said Agent is acting solely in the capacity of Agent of said Theatre Owner, and is not liable or responsible for the failure on the part of any artist or artists booked to fulfill their contracts, nor is said Agent responsible for any accident or delay that may prevent said artist or artists from arriving in Chattanooga, Tenn. when they are scheduled. It is understood, however, that said Agent will use every precaution to see that artists fulfill their contracts.

6. It is further mutually agreed between the parties hereto that said Theatre Owner may cancel this contract by giving said Agent six (6) weeks' notice in writing of his intention to discon-
79 tinue booking arrangements entered into with said Agent.

Witness our hands this the 24th day of May A. D. 1909.

INTERSTATE AMUSEMENT COMPANY,
B. S. MUCKENFUSS, *Booking Manager.*
CATRON AND ALBERT,
Pr. WILL S. ALBERT, *Mgr.*

Airdome Theatre, (Will S. Albert)
Chattanooga, Tenn.
Contract in force—5 years.
Start. May 17th, 1909.
Expires " " , 1914.
Book Comm. 5%.
Book Charge $10.00.
Limit $450.00
Remarks: 6 weeks' notice.

80 *Decree Enrolled 14th Day of March, 1913.*

No. 13637.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et al.

In this cause, the demurrer of W. S. Albert to the original bill is overruled, with lease to rely thereon at the hearing.

It appearing from the answer of defendant Tennessee Realty & Leasing Co. that it stands ready and willing to pay into Court the sum of $1554. in its hands on being protected against all manner of claims by all parties hereto, and that it has heretofore held same as a depositary selected by complainant and defendant W. S. Albert, having no further interest in the fund than that of a depositary, and that the conduct of said Tennessee Realty & Leasing Co. has been throughout in good faith.

It is accordingly, by consent of parties, further ordered and decreed—

(1) That within one week from this date said Tennessee Realty & Leasing Co. pay to the Clerk and Master of this Court said sum of $1554. and on paying the said sum of $1554. to the Clerk and Master he will issue a receipt therefor and thereupon defendant Tennessee Realty & Leasing Co. will stand discharged from all liability of any nature whatsoever to either of the other parties hereto, and the costs incident to making it a party defendant will be charged as part of the costs of the cause.

(2) The Clerk and Master will loan the fund thus received at the rate of 6 per cent per annum, taking a note with approved security therefor.

The question of any cost or counsel fees, if any, incurred by said defendant Tennessee Realty & Leasing Co. in relation to said fund is reserved.

To that part of above decree adjudging that said Tennessee Realty & Leasing Co. held said fund as a depositary selected by complainant and defendant Albert, the said defendant W. S. Albert excepts.

81 *Decree Enrolled 5th Day of August, 1913.*

No. 13637.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

This cause came on for hearing before the Chancellor, Hon. T. M. McConnell, on this August 5th, 1913, and after the cause had been submitted on bill, answer, proof taken in the cause, and the entire

record, and before the Court had rendered any opinion, the solicitor for defendant Albert appeared and made formal motion that the entire cause be remanded for the further taking of proof upon the single point as to whether or not the complainant, Interstate Amusement Company, had ever registered its Charter as a foreign corporation with the proper authorities in Tennessee, so that it could *not* business in that State.

Upon consideration of said motion, which was filed, the Court was pleased to, and did, remand the cause to the Docket of said Court so that proof upon said question could be taken and filed.

In order to save costs, the taking of proof in relation to said point, and the delay which would be occasioned thereby, the complainant, by solicitor, in open Court, admitted that complainant is a foreign corporation, but has never up to this time domesticated itself in Tennessee by registering with the Secretary of State in said State, its Charter as such foreign corporation.

It is agreed that the cause may be heard immediately so that if there is an appeal the same may go to the next term of the Supreme Court at Knoxville.

*Final Decree Enrolled 5th Day of August, 1913.*

No. 13637.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

Be it remembered this cause came on to be heard this August 5th, 1913, on the demurrer of defendant W. S. Albert and then the entire record, including agreements of counsel, from all of which the Court is of opinion and decrees:

82 1. That the said demurrer should be and is hereby allowed and overruled.

2. That complainant ha*b*e and recover of defendants W. S. Albert and F. M. Catron, jointly and severally $1554.00 with interest since February 14th, 1912, making a total, principal and interest of $1693.86 together with all the costs of this cause for which execution is awarded.

3. And certain funds having been paid into this Court by Tennessee Realty & Leasing Company almost sufficient to satisfy the above recovery; and said funds having been subsequently withdrawn by defendant Albert by agreement of parties on condition that said Albert would give bond to pay any recovery which complainant might sustain herein; and at the time of such withdrawal said W. S. Albert, together with Sophia Albert, having executed an obligation whereby in consideration of said W. D. Albert then receiving said money, he and Sophia Albert agreed to pay whatever recovery complainant should subsequently sustain herein; It is, therefore, further decreed that complainant recover of said Sophia Albert, as surety of W. S. Albert, said sum of $1693.86, together with all

costs hereof and for all of which execution is awarded. But a payment by and of the defendants herein, either in whole or in part, of the recovery above, will operate as a discharge of that amount of complainant's indebtedness and no further execution can issue for such amount of said indebtedness as is thus paid.

4. To the foregoing decree and to action of court in heretofore overruling his said demurrer defendant W. S. Albert excepts and prays an appeal to the next term of the Supreme Court, which is granted on his giving bond as required by law.

Thereupon came into open Court W. S. Albert as principal, and Sophia Albert as his surety, each of whom acknowledged themselves indebted to complainant for the sum of $2000 but to be void on condition that said W. S. Albert successfully prosecutes the appeal thus prayed, or in default that he abide by and perform the judgment of said Supreme Court in the premises. And said bondsman being good and solvent said appeal is accordingly granted and the Clerk will make and certify the transcript accordingly.

83 Co. and all decrees in the case.

Yours very sincerely,

W. B. MILLER.

84 A.

| No. | Solicitors. | Parties. |
|---|---|---|
| 13637 | W. E. Drummond<br>W B. Miller<br>Joe V. Williams<br>Coleman & Frierson | Interstate Amusement Company<br>vs.<br>W. S. Albert, Fletch Catron and Tennessee Realty and Leasing Co. all of Hamilton County, Tenn. |

1913.

Feb. 4th. Original bill filed.
" 4th. Prosecution Bond W. E. Drummond and W. B. Miller sureties taken & filed.
" 4th. Copy of bill 1500 W. & Spa. to ans. issued to Sheriff for all def'ts.
" 11th. Answer of Fletch M. Catron filed. Notice given.
" 13. Demurrer and separate answer of W. S. Albert filed. Notice.
" 13. Spa. to ans. 2/7 served by Jno. A. McGill, D. S.
" 24. Interrogatories to be propounded to B. S. Muckenfuss filed. Notice.
" 27. Motion to dispose of demurrer filed. Notice.
" 28. Motion of Joe Williams to withdraw papers.
Mar. 1. Order of Chancellor on dem. & ans. W. S. Albert issd. to shff. for deft. and retd. 3/1 served by J. A. McGill, D. S.
" 5. Motion of J. V. Williams to withdraw papers filed.
" 5. Answer of Tenn. Realty & Leasing Co. filed. Notice given.

" 11. Cross Interrogatories for B. S. Muckenfuss filed. Notice given.
" 11. Cert. copy Ints. and cross Int. for B. S. Muckenfuss and commission to take depo. ($2.50) issd. to Chas. E. Romirez Home Life Ins. Bd. 257 Broadway, N. Y.

1913, Feb. Term.

Mar. 14. Order overruling demurrer with leave to rely on same at hearing, ordering Tenn. Realty & Leasing Co. to pay to C. & M. $1554. Order to lend fund 2 D. 591.
" 14. Deposition of B. S. Muckenfuss recd. from P. O. opened and filed. 2 notices.
Apl. 15. Motion of W. B. Miller ti withdraw papers and retd.

1913, Term April.

Al. 22. Cont. by consent. 2 D. 709.
Jun- 6. Deposition of W. S. Albert filed. Notice given.

85

June 6. Deposition of H. L. Sperry & Tony Sukelum filed. Notice.
July 7. Motion of J. V. Williams to withdraw papers.
July 8. Stipulation of counsel filed.
July 8. Stipulation of counsel filed.
July 8. Motion to remand filed.
July 8. Affidavit of J. V. Williams filed.
Aug. 11. Motion W. B. Miller to withdraw papers.
Aug. 5. Original contract filed.

1913, June Term.

Aug. 5. Order remanding cause, &c.
Aug. 5. Final decree, judgt. in favor *og* complt. vs. W. S. Albert and Sophia Albert surety $1,693.86 and cost of cause. Praying appeal, Sophia Albert surety of record.
Aug. 5. Designation of deft. for transcript filed.
Aug. 5. Designation of complt. for transcript filed.

86

| No. | Solicitor-. | Parties. |
|---|---|---|
| 13637 | W. E. Drummond.<br>W. B. Miller<br>Joe V. Williams<br>Coleman & Frierson | Interstate Amusement Co.<br>vs.<br>W. S. Albert et al. |

1913
Feb. 4 State Tax ..... 2.50
County Tax ..... 2.50
25 25 25 25 1.50
Bill aff bond recdg copy of bill..... 2.50
25 75 25
Cert spa ans ..... 1.25

25 25 25 25
Not int not motion ..... 1.00
25 10 50 10
Not motion order motion ..... .95
25 25 50 25 50
Ans aff 2 not X int 2 not..... 1.75
2.50 50 25 75
Cert copy int decree depo 3 not..... 4.00
10 25 1.00 50 75
Motion order depo 2 depo 3 not..... 2.60
10 25 25
motion stipulation stipulation ..... .60
25 50 25 10
motion 2 notes aff motion ..... 1.10
25 75 75
contract decree decree ..... 1.75
90 50
dktg bill cost..... 1.40

18.90

J. A. McGill, D S serving 3 defts..... 3.00
R. S. Muckenfuss witness one day..... 1.00
H. L. Sperry " " " ..... 1.00
Tony Sudekum " " " ..... 1.00
Buford Duke, N P Taking 2 depo..... 2.00
Chas. E. Romeriz Comr. " 1 " ..... 1.00

$32.90

June Term 1913

Aug. 5th: Final decree: Judg. vs. W. S. Albert and F. M. Catron and Sophia Albert surety for W. S. Albert for $1,693.86 and cost; Granting appeal.

Cost incident to appeal:

25 50 25
Order surety of record designation ..... 1.00
25.60 50 25
Transcript 25,600 W seal ex..... 26.35

$27.35

87 *Certificate of Clerk and Master.*

STATE OF TENNESSEE,
*County of Hamilton:*

I, Sam Erwin, Clerk and Master of the Chancery Court of said County, hereby certify that the foregoing sixty three pages of words and figures comprise a full true and perfect transcript as required by the rules of the Supreme Court and as set out by designations, of all the records, pleadings, exhibits, proof and proceedings had by said Court in the cause wherein the Interstate Amusement Company

is Complainant and W. S. Albert, et al, are defendants, as the same remains of record and on file in my office.

Witness my hand and the seal of said Court at office in the City of Chattanooga, Tennessee, this the 5th day of September, 1913.

[SEAL.] (Signed) SAM ERWIN. *C. & M.*,
By P. E. McMILLAN, *D. C. & M.*

88 No. 1.

Filed September 8, 1913. S. E. Cleage, Clerk.

In the Supreme Court of Tennessee ,at Knoxville, September Term.

No. —. Hamilton County, Equity.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

*Statement of Case, Assignment of Errors, and Brief in Behalf of Defendant, W. S. Albert.*

This suit was instituted in the Chancery Court of Hamilton County against W. S. Albert and F. M. Catron, to recover $1,554.00. The bill alleged said defendants were indebted to the Complainant in this sum, as shown by a statement attached to the bill (Tr. 5.)

It was alleged in the bill that the defendant Tennessee Realty & Leasing Company owed a considerable sum in excess of this amount to the defendant Albert, and that a short time before the filing of the bill the solicitor of complainant arranged with the defendant Albert and his solicitor, for this fund to remain in the custody of the defendant Company, to see if the defendant Albert could get a reduction of the indebtedness claimed by complainant, and that in the event he could not, sufficient of the funds in the hands of the said defendant Company should go to the payment of said indebtedness (tr. 3).

89 It was further alleged that the defendant Albert made efforts, according to his representations, to get a reduction, but being unable to do so, he undertook to collect said fund of the defendant contrary to said agreement (Tr. 4).

Defendant Catron filed a separate answer, in which he admitted that he and the defendant Albert had been in partnership, and had operated the Airdome Theatre in Chattanooga, but had dissolved such partnership. He further alleged in his answer that he had filed a voluntary petition in bankruptcy, and obtained a discharge, stating that he would file copy of the adjudication of himself as such bankrupt, and contended that all proceedings herein as to himself, should cease. (Tr. 7). It is proper to state that no such instrument was ever filed.

The defendant Albert filed a demurrer and answer (Tr. 7). The demurrer was to the effect that the bill showed upon its face that the complainant was a foreign corporation, and that the bill showed the suit was based upon an account and contract, the ac-ount being, as alleged in the bill, that the defendants Catron & Albert owed to the complainant the sum sued for, for booking commissions in furnishing acts to defendants; said theatre, and the contract being the one made just prior to the institution of this suit between complainant's solicitor and defendant Albert and his solicitor, with respect to a transfer of the funds due defendant Albert from the defendant Tennessee Realty & Leasing Company.

Notwithstanding this, there was no averment in the complainant's bill that the complainant, as such foreign corporation had domesticated itself, as required by the Statutes of Tennessee and for this reason complainant had no legal right to maintain this action (tr. 8).

90 Said demurrer was overruled because it was a speaking demurrer, but the Court gave defendant Albert the right to rely upon the same at the hearing (Tr. 25).

The defendant Albert, not waiving said demurrer, but fully relying upon the same, answered, admitting that he was a member of the partnership of Catron & Albert, the Articles of co-partnership being filed as Exhibit No. 1 to his deposition.

It was alleged in the answer of defendant Albert that said partnership had some time before that been dissolved, and that the partners had sold out their interest in the Airdome Theatre to the Tennessee Realty & Leasing Company, and it was admitted that the Tennesee Ralty & Leasing Company: *and it was admitted that the Tennessee Realty & Leasing Company* owed the defendant Albert a considerable sum. It was further averred in said answer that said partnership of Catron & Albert owed considerable indebtedness; that the defendant Catron had secretly undertaken to convey all of his interest in the funds in the hands of the Tennessee Realty & Leasing Company, that he had become insolvent, and that the defendant Albert, who was solvent was left with this indebtedness to pay. (Tr. 8-9.)

It was denied in said answer that the firm of Catron & Albert or W. S. Albert owed to the complainant the sum of $1554. (Tr. 9). It was admitted that an indebtedness had been owing to complainant by said firm, but that the defendant Albert had performed valuable services for complainant, worth considerably more than the amount of indebtedness claimed by complainant; and the answer set up the fact that said defendant Albert had hopes he could make some amicable adjustment with complainant with respect to said claim.

It was denied in the answer that the Agreement as set out in said bill, with respect to defendant's interest in said funds in the hands of the Tennessee Realty & Leasing Company, provided that said funds should remain there for the purpose of paying said

91 indebtedness. It was admitted, however, that inasmuch as defendant Albert had performed this valuable service for complainant, that he would agree to let said funds remain in the hands of defendant Tennessee Realty & Leasing Company, to see if an

equitable compromise could be made with complainant, and that efforts had been made to this end but to no avail; and that the reply of the complainant was that complainant's solicitor should collect the entire sum of $1.554. of this defendant (Tr. 10-11-12).

The answer of defendant Albert further set up the fact that the firm of Catron & Albert had a written contract with complainant, which contract is filed in the record (Tr. 54), and which was executed May 24th, 1909 (Tr. 53). It was shown that in this contract the complainant, a theatrical booking corporation situated at Chicago, Ill., was to book acts and furnish artists for Catron & Albert's theatre in Chattanooga, known as the Airdome Theatre, for which said Catron & Albert were to pay a stipulated commission to complainant, and in addition a booking fee; but these commissions and these bookings fees were to be conditioned upon the artist or artists actually coming to Chattanooga and performing (Tr. 53).

This part of the contract is important, and is clause five thereof, and is as follows:

"It is agreed that said agent (The Complainant) is acting solely in the capacity of agent of said theatre owner (Catron & Albert) and is not liable or responsible for the failure on the part of any artist or artists booked to fulfill their contracts, nor is said agent responsible for any accident or delay that may prevent said artist or artists from arriving in Chattanooga when they are scheduled. It is understood, however, that said agent will use every precaution to see that artists fulfill their contracts. (Tr. 11-53).

92 It was alleged that a proper interpretation of the contract showed that the same was to be executed in Chattanooga, Tennessee, and that, in fact, the contract was not complete until the artists actually came to Chattanooga and performed (Tr. 11).

It was further averred in the answer of defendant Albert that at the request of complainant and its officers, defendant Albert acted as complainant's agent in Chattanooga for a number of months; that he wrote numerous letters to theatrical agents throughout the South to get booking contracts for complainant, and, in fact, secured a number of valuable contracts.

Defendant Albert alleged he had never rendered any bill for his said services, but supposed when final settlement was made that complainant would offer to compensate him therefor, or make some suitable adjustment of the indebtedness sued upon (Tr. 12).

It was averred in said answer that after complainant had declined to make any adjustment, or to allow defendant Albert any compensation for his services, that the defendant Albert regarded that he nor the firm of Catron & Albert owed the complainant anything, for the reason that complainant was a foreign corporation, had never domesticated itself as required by the laws of Tennessee, although it was engaged in carrying on business in Tennessee.

It was alleged that complainant had violated the statutes of Tennessee in relation to foreign corporations, and for that reason the complainant could not lawfully maintain its action on the account and contract in question (Tr. 12-13).

The defendant Tennessee Realty & Leasing Company filed an

answer, in which it admitted that it held the amount set up in the bill, $1,554., which belonged to defendant Albert, and which it held as a depositary and by agreement of all parties concerned. Said defendant stated in its answer it stood ready to pay this sum into court when ordered to do so (Tr. 14-15).

93 Complainant introduced no testimony, but defendant Albert introduced testimony of a number of witnesses, and upon a trial of the cause the demurrer of the defendant Albert was overruled (Tr. 57), and the cause then came on for final hearing on the entire record, when the Chancellor decreed that the complainant should recover of defendant Albert the sum of $1693.86 (principal and interest,) together with costs of the cause. The defendant Albert excepted to said decree, and prayed and was granted an appeal to this Court (Tr. 57).

*Assignment of Errors.*

I.

The Court erred in overruling the demurrer of defendant Albert.

II.

The Court erred in giving complainant a degree against the defendant W. S. Albert, for the sum of $1693.86, and costs, or any other sum.

*Brief and Argument.*

I.

94 The bill shows upon its face that the complainant is a foreign corporation, and that this suit is based upon an account made for booking furnished defendant Catron & Albert's theatre at Chattanooga, Tennessee, and, in addition, that the sum sued for is due by agreement made by complainant's solicitor with defendant Albert and his solicitor just prior to the filing of the bill.

The Court overruled defendant Albert's demurrer, saying it was a speaking demurrer. We contend this was error.

Gibson's Suits in Chancery, Sec. 307.

Trust Co. v. Weaver, 18 Pickle, 66.

It is our contention that in view of the Tennessee statutes regarding the doing of business in Tennessee on the part of foreign corporation-, it is necessary in the complaint to allege either (1) that the indebtedness arises in a transaction involving interstate business, or (2) that such foreign corporation has complied with the Tennessee Statutes by having itself domesticated so that it can carry on business in this State. Neither of these things were averred in this bill.

The laws of Tennessee making provision for foreign corporations to do business in Tennessee are as follows, to-wit:

The original Act is Chapter 31 of the Acts of 1877, the title of which is as follows:

"An Act to declare the terms on which foreign corporations organized for mining, or manufacturing purposes may carry on their business, and purchase, hold and convey real and personal property in this State."

Sections one and two of said Act related to the doing of business on the part of such foreign corporations in Tennessee; and Section three provides that, after such corporations have performed the acts required in said Statute, they shall then "be subject to the jurisdiction of the Courts of this State, and may sue and be sued therein in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this State."

95 The next Statute in regard to foreign corporations is Chapter 122 of the Acts of 1891, the title of which, and the Act are as follows:

"An Act to amend Chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold and convey real estate and personal property in this State, so as to make the provisions of said Act apply to all foreign corporations that may desire to own property or to do business in this State.

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That Chapter 31 of the Acts of 1877 be so amended and enlarged as that the provisions of said Act shall apply to all corporations charted or organized under the laws of other States or counties for any purpose whatsoever which may desire to do any kind of business in this State.

"SEC. 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this statem for any purpose whatever, desiring to own property or carry on business in this State of any kind or character, shall first file in the office of the Secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the Register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by Section 2 of Chapter 31 of Acts of 1877.

"SEC. 3. Be it further enacted, that it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100. nor more than $500. at the discretion of the jury trying the case.

"SEC. 4. Be it further enacted, That when a corporation complies with the provisions of this Act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of

this State, just as though it were created under the laws of this State."

The next statute in relation to this matter is Chapter 81 of the Acts of 1895, the title of which and the body of the Act are as follows:

"An Act to amend Sections 2, 3, and 4 of an Act passed March the 21st, 1891, being Chapter 122 of said Acts, and providing for the authentication of copies of charters to be filed with the Secretary of State, registering abstracts of same in the register's office in each county in which the company desires or prop-ses to carry on business.

96 "SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That Section 2 of an Act passed March 21st, 1891, being Chapter 122 of the said Acts, be so amended as to read as follows: That each and every corporation created or organized under, or by virtue of, any government other than that of the State, for any purpose whatever, desiring to own property, or carry on business in this State of any kind or character, shall first file, in the office of the Secretary of State, copy of ots charter. It shall be sufficient to authenticate such copies so filed by the certificate of the secretary, or secretaries, of such corporations, and by attacheing thereto the corporate seal.

"SEC. 2. Be it further enacted, That Section 3 of said Act passed March the 21st, 1891, be so amended as to read as follows: That it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this State without first having complied with the provisions of this Act, and a violation of this *State* shall subject the offender to a fine of not less than $100.00 nor more than $500.00, in the discretion of the jury trying the case.

"SEC. 3. Be it further enacted, That Section 4 of said Act passed March the 21st, 1891, be so amended as to read as follows: That when a corporation complies with the provisions of this Act, said corporation may then sue and be sued in the courts of this State, and shall be subject to the jurisdiction of this State as fully as if it were created under the laws of the State of Tennessee, Provided, that this Act shall not affect any contracts or remedy heretofore made by foreign corporations, not having complied with the existing laws on the subject."

It will thus be seen that by the Acts of 1895, which are controlling here, each and every corporation organized under any other State or Government and desiring to own property or carry on business in this State, of any kind or character, shall "first file in the office of the Secretary of State its charter," and in Section two of said Act it is provided that "it shall be unlawful for any foreign corporation to do business, or attempt to do business, in this State without first having complied with the provisions of this Act," and the penalty of such violation shall be not less than $100., nor more than $500., and by section three of the Act it is provided that it is only when these things shall have been done in advance that such corporations shall have the right to sue and be sued in the courts of Tennessee.

It was held in the case of Cary-Lombard Lumber Co. v. Thomas,
8 Pickle, 587-597, that every transaction or contract performed
in Tennessee on the part of a foreign corporation which had
97 not domesticated itself, was illegal, and it was further held
that:

"In order to entitle the complainant to any relief, it must show affirmatively that it had complied with the law, until that is done, all its transactions are illegal. The burden of proof being upon it, the Court can presume nothing in its favor, and can only hold such of its contracts enforcible as it shows were made after it had complied with the law enabling it to make a valid contract, and to transact business." (Supra, 594).

It was held in the case of Cumberland Land Co. vs. Canter Land Co., 35 S. W. Tenn. Court of Ch'y. App.) 886, that where it appears in the bill that the complainant was a foreign corporation, and was doing business in Tennessee, "that it was incumbent on complainant to show affirmatively that it had complied with our Statute, on a compliance with which it was alone authorized to do business here."

The rule for which we contend is admirably stated in the case of Wood v. Ball, 190 N. Y. 217.

In that case the Court discussed the provisions of a taxing law requiring the payment of a license fee for foreign corporations for the privilege of carrying on business in the State of New York, and prohibiting the maintenance of actions by such foreign corporations in the Courts of that State, unless such license fee had been paid at or within the specified time. The Court of Appeals of that State held that such statutory provision was a condition subsequent to the right of such foreign corporation to carry on business in New York State, and that a complainant in an action by such corporation brought in the State of New York was not subject to attack for failure to allege compliance with such statute, it being held that a non-compliance could be availed of as a defense in answer.

It was also held in that case that under the general corporation law
of New York providing "No foreign stock corporation other
98 than a monied corporation, shall do business in this state
without first having procured * * * a certificate that it has complied with all the requirements of law * * * and prohibiting any such corporation from maintaining "any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate,", that a compliance with such requirement and an allegation to that effect in the original pleading is a condition precedent to the right of such foreign corporation to lawfully do business in New York, and to maintain a suit there for the enforcement of such contract made in that State.

It was said by the Court that this affirmative allegation was essential in the pleading in order to set forth a cause of action, and the objection that the complaint does not state facts sufficient to

constitute a cause of action is not waived by the failure to raise it by demurrer or answer.

This holding was based upon the following statute: which is set out in the opinion in the case referred to, to-wit:

"No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar business. * * * No such corporation now doing business in this state shall do something here-in after December 31st, 1892, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." (L. 1892, Ch. 687, sec. 15, L. 1901, ch. 538, sec 1).

The opinion of the Court of Appeals makes a distinction between statutes, some of which as above pointed out, are conditions subsequent, and can be relied on as a defense, and others a compliance with which is a condition precedent to the right to maintain an action.

99 The theory of the law seems to be that where the doing of a thing is unlawful, that no action can be maintained unless it be shown that there has been a compliance.

"On the other hand, the requirement of section 15 of the General Corporation Law, which led to the result in the Welsbach case, is a condition precedent to the right of a foreign stock corporation to lawfully do business in this state. The procuring of a license must precede the transaction of business or the contracts of the corporation are not lawful. Aside from the provision withholding legal remedies, no such corporation can lawfully make contracts in this state without obtaining the certificate in advance. The object of this statute is not to raise revenue, but to require certain foreign corporations, once for all time, to comply with such conditions as the legislature deemed necessary for the protection of our own citizens. Those requirements appear in section 16 and the certificate provided for in section 15 is conclusive evidence that they have been performed. Thus the corporation is required to file — the secretary of state a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in this state; to designate a place of business within this state which is to be its principal place of business here and to appoint a person upon whom legal process may be served in this state. These are the conditions upon which it is permitted to enter the state for the purpose of carrying on business. Until it complies with them and procures a certificate from

the secretary of state that it has complied with them it cannot carry on business here except in violation of law. The command is that it 'shall do no business in this state without first' procuring the certificate of compliance. 'Without', as thus used, is a word of exclusion, and excludes from the right to do business in this state every foreign corporation of the kind specified which has not obeyed the statute. 'The legislature has said that the thing shall not be done and that is enough.' (Jackson v. Walker, 5 Hill., 27, 32. Foley v. Speir, 100 N. Y., 552, Johnston v. Gahlgren, 166 N. Y., 354, 358.)"

* * * * * * *

"The Welsbach cause came before us upon a certificate of the appellate Division, presenting the following questions for decision:

"Was the complaint demurrable upon the ground that it appears upon the face thereof that the plaintiff did not have legal capacity to sue?

"Was the complaint demurrable on the ground that facts are not therein stated sufficient to constitute a cause of action?

"We affirmed the order appealed from and answered both questions in the affirmative. The only defect claimed to exist in the complaint in that case was the omission to allege compliance with section 15 of the General Corporation Law. The same defect exists in the complaint now before us. There is no allegation, either general or specific, that the condition precedent in the statute has been performed (Code Civ. Pro., sec. 533). Such an allegation is essental in order to set forth a cause of action, and the objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by the failure to raise it by demurrer or answer. (Id. sec. 499).

* * * * * * *

"We think that compliance with section 15 of the General Corporation Law should be alleged and proved by a foreign corporation such as the plaintiff, in order to establish a cause of action in the courts of this state. The cases holding otherwise should be regarded as overruled and the conflict of authority ended."

Wood v. Ball, *supra,* 223, 225.

The New York and Tennessee statutes are similar. The New York Statute requires the payment of a fee on the part of a foreign corporation as a condition precedent to its right to do business and to institute suits on contracts made in that State, while the Tennessee Statute requires foreign corporations, before they can transact any business in Tennessee, to register their charters with the Secretary of State, and on failure to do so, such corporations shall be punished for the doing of a misdemeanor. The Tennessee statute provides for such foreign corporations to sue and be sued only when this is done.

In the New York Statute it seems there is no express prohibition against doing business without a license, and no punishment is provided for criminal violation, but the penalty imposed is the withholding of the right to sue until fee is paid.

If there is any difference, therefore, between the Tennessee and the New York Statutes, it seems the Tennessee law, as to the requirement of a foreign corporation litigant to show affirmatively a compliance, is more drastic than the New York Statute.

## II.

We insist the proof in the record abundantly shows that this complainant, a foreign corporation, can not maintain this suit for the reason that the proof shows it has been engaged in carrying on business in Tennessee, which is not interstate business, and that
101 not having complied with the Tennessee Statutes as to foreign corporations, it can not lawfully maintain this proceeding.

As mentioned above, the complainant introduced no proof whatever. Defendant Albert introduced, among others, Mr. B. S. Muckenfuss, who was booking agent for complainant during the existence of the contract between complainant and Catron & Albert. (Tr. 15). Mr. Muckenfuss stated he was acquainted with defendant Albert; that during the life of the contract between complainant and defendants Catron & Albert, witness was booking manager of complainant, engaged in booking vaudeville attractions through the country. Witness stated he believed the president of complainant had owned some property in Nashville, witness having gotten this information, as he remembered, from the complainant personally (Tr. 10). Witness stated complainant had been engaged in the booking of attractions in Tennessee, this being done from the main office of complainant at Chicago, Ill., but that complainant had no agent or office in Tennessee, but had soliciting agents who visited that state. Witness said he, himself, had visited Tennessee, and had solicited business for complainant (Tr. 17). He stated defendant Albert had been written to repeatedly by both the president and himself in the name of the company, asking him to use his influence in obtaining for complainant bookings of other Southern theatres, and that it was through the influence of defendant Albert, to a large extent, that at least three theatres were induced to give their bookings to complainant. Witness stated defendant Albert had no written contract to represent complainant Company. (Tr. 17.) He stated defendant Albert had performed valuable services for complainant.

Defendant Albert testified he operated, in connection with defendant Catron, the Airdome Theatre in the city of Chattanooga; and that prior to the making of the contract with complainant that some friend in Chattanooga solicited him to take the bookings of
102 complainant. It was stated to defendant by said friend that the manager of complainant had written this friend, asking him to see defendant Albert. Defendant Albert took this letter, took the matter up with complainant, which resulted in the contract on file in the record (Tr. 20, 22). The contract was signed by complainant at Chicago, sent to the defendants, and they signed same at Chattanooga (Tra. 22).

The firm of Catron & Albert continued to take complainant's bookings for some time, and until January, 1912. Defe-dant Albert says the president of complainant, and Mr. Muckenfuss and Miss Bloom and a Mr. Reddick, all representatives of complainant, saw Albert, and asked him to represent complainant and to use his influence with other Southern managers whom he knew personally to make contracts with complainant (Tr. 22); that Mr. Muckenfuss came to Chattanooga, spent a day or so, and personally requested defendant Albert to do this. The other requests were made in person, in Chattanooga, and some made by letter (Tr. 22).

In pursuance of this request, defendant Albert, who was at Chattanooga, began negotiations with the Southern managers of theatres to obtain contracts for complainant. He wrote many and exhaustive letters to numerous Southern agents of theatres, including the agents at Knoxville, Nashville, Chattanooga and other points. He also saw many of them personally, and urged them to take complainant's bookings. At that time none of these people had contracts with complainant, but were taking bookings from other companies. Albert says he was very successful in getting numerous theatres to enter into contracts with complainant, all of which was very valuable to complainant. Albert had been in the theatre business a long time, and knew these people personally. The value of this service to complainant, according to defendant Albert, was from thirty-five to fifty thousand dollars a year (Tr. 24.).

103 Albert filed letters from complainant's officers showing that they acknowledged he had performed valuable services for complainant, among others being a letter from Carl Hoblitzell, President of complainant, in which he expressed his gratitude for everything that Albert had done in behalf of complainant (Tr. 33). Another letter from booking manager Muckenfuss stated "every house that was secured for the Interstate Independent I secured, and you helped me get several of the houses (Tr. 37).

Albert secured some of these letters which he had written to these managers, among others being one at page 37 of the transcript, which was written to defendant Albert by Celia Bloom, booking manager of complainant, dated February 28, 1912. (This letter was sent by defendant Albert to Mr. Sperry's theatre at Nashville, and after this suit was brought said letter was returned to witness.)

All these letters show that Albert spent considerable time, and went exhaustively into the reasons why these theatres should take their bookings from the complainant. Albert said he was continuously writing these letters every week. (Tr. 25.)

Albert said the interest of himself and Catron in the Airdome Theatre were sold to the Tennessee Realty & Leasing Company, and that subsequently Catron had secretly sold all of his interest in said Leasing Company, then became insolvent, and went into bankruptcy, leaving a large indebtedness owing by said Airdome Theatre for defendant Albert to pay. Albert stated he was solvent, and that he thought complainant would do the square thing and allow him something for his services (Tr. 26-27).

He further testified that about the time the Tennessee Realty &

Leasing Company was to make a payment to defendant, that W. B. Miller, solicitor for complainant, came to defendant Albert, and insisted upon a payment of $1,554. to complainant. Defendant Albert was willing, and agreed, for a sum equal to this to remain in the hands of the Tennessee Company pending his efforts to
104 get a compromise with complainant, he being willing to pay $800. (Tr. 27). He said he was unable to make any compromise adjustment with complainant, however, and that he then received a letter from Mr. Miller stating that the president of complainant would make no concession, and demanded full payment.

Defendant Albert stated he nor his firm were indebted to complainant, but that complainant, in fact, was indebted to him and that inasmuch as he had been advised that complainant could not lawfully collect the same, he declined to make payment (Tr. 27-28).

Defendant Albert said the reasonable value of his services to complainant would be more than the amount of the claim of complainant in controversy (Tr. 29).

On cross-examination, witness Albert admitted that he had written and signed at the bottom of complainant's statement of account, the following words: "We certify that the above is correct, according to the amounts due to date", but he said he did this because complainant urged him to sign such an agreement while the matter was fresh, and with the understanding of the facts above detailed.

The deposition of H. L. Sperry, connected with certain theatre companies at Nashville, Tennessee, was taken. He stated that the representative of complainant came to Nashville, and entered into a contract or contracts to furnish bookings there. (Tr. 37, 38.) Witness Sperry testified he understood the complainant had purchased valuable real estate in Nashville, for the purpose of erecting upon the same a theatre, this real estate being the site of the old Board of Trade building. He said this information came to him from Mr. Chauteau, agent of complainant at Nashville, in 1911. He said before he made his contract with complainant's representative at Nashville, that Mr. Chateau threatened, if contract was not made, that complainant might put up a theatre building on this lot (Tr. 40).

105 Witness Sperry also testified that defendant Albert had solicited him a number of times by letter and otherwise to make contracts for his theatres with complainant (Tr. 40, 41). He filed various letters from defendant Albert (Tr. 37).

Defendant Albert also took the deposition of another Nashville Theatre man, Mr. Tony Sudekum, who testified that he and his associates at Nashville had entered into a contract at Nashville with a Mr. Renne, as representative of complainant, for bookings for Nashville theatres (Tr. 46-47).

The questions, therefore, for decision in this case, is whether or not the complainant has been engaged in the carrying on of its business in Tennessee, so as to require it to comply with our laws.

The case of Lumber Co. v. Moore, 18 Cates, 313, defines the doing and carrying on of business to mean only a prosecution on the part of a foreign corporation of its usual and customary business within

the borders of Tennessee, for our Statutes to apply. It seems under this case that simply having an agent and maintaining an office within the borders of Tennessee, where the usual and customary business of a corporation has not been done, does not make such corporation amenable to our Statutes.

This rule was announced evidently for the reason that the Court concluded the having of an agent and maintaining an office in Tennessee alone and of themselves was not the doing of the usual and customary business of the corporation in question, and hence, where it is not shown that the corporation has been engaged in the prosecution of its usual and customary business, it is not required to domesticate itself.

The test, therefore, as defined in this case of Lumber Co. v. Moore, Supra, is, whether or not such corporation is carrying on its usual and ordinary business; and according to this rule, we insist that the record abundantly shows complainant was in the business of
106 conducting and operating a general theatrical and amusement business.

For pleadings and some letters of complainant and its officers filed in the record show that it has its main office at Chicago, Ill., and there is other proof introduced showing that it has made certain contracts in Tennessee. The only other proof in all the record that it has ever done any business outside of Tennessee, is the proof of defendant Albert, who testified that he, while in Tennessee, by correspondence and otherwise, obtained other contracts for complainant with various theatre managers throughout the South.

So the record shows that the only business in which complainant has ever been engaged has been done in Tennessee. In other words, for all that can be gleaned from the record, complainant has an office in Chicago, Ill., and is a foreign corporation; but the only business it has ever carried on has been the making of contracts in Tennessee, and using that state, through its agents, as a field to obtain contracts of other theatres managers in other states.

This distinctly indicates a purpose on the part of this complainant to engage in a business in the State of Tennessee contrary to its laws, and to make this State its field of operation for the doing of its usual and customary business.

So we have, admittedly, and beyond any question, a foreign corporation which has been engaged in doing business in Tennessee, whether that be little or much, and not the slightest evidence that it has had more business in any other state, or that it had its chief business in any other State.

In such circumstances, it seems to the writer there is no question but that this complainant is amenable to the Tennessee laws.
107 In the case of Cooper Man'f'g Co. v. Ferguson, 113 U. S. 727, 723, the Court said:

"What meaning and what limits are to be assigned as the statutory phrase 'to do business' is a matter of elaborate argument by counsel. * * * Taking the language in its ordinary acceptation, a corporation does business by the exercise of its power to con-

tract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it *e*stablishes its*b* business relations, assumes obligations, and acquires rights. It is submitted that this opinion of the State court should be accepted here as a correct interpretation of these provisions of its laws. It is said by counsel 'that the making of such a single isolated contract is not doing business in the State in the sense contemplated by the foregoing provisions.' If it is not doing business, how many isolated contracts are required to constitute 'any business' within the meaning of the prohibition? The most extensive business that may be carried on is made up of individual transactions or isolated contracts. If the continued and regular business is unlawful, how can any one in the series of contracts of which the continued and regular business is composed be lawful? No sound argument can be made from the hardship of the case."

* * * * * * *

"So far as appears by the record, the plaintiff had no principal place of business whatever in the State of Colorado, and the making out of the contract set out in the complaint was the only business ever done by it, or that it ever purposed to do in that State.

"The question, therefore, is whether, upon a true construction of the Constitution and statute, the making of the contract which the plaintiff seeks to enforece was, under the circumstances forbidden."

We contend, in the light of this record, that complainant transacted business in Tennessee, by and through its regularly appointed agent, who had an office and maintained a business for complainant in Tennessee.

Albert was designated by complainant, according to the proof, to act as its agent, and in pursuance of this relation he undertook to transact the complainant's business in Tennessee and even if the laws in relation to foreign corporations require an office and agency to be first shown, before such foreign corporations would be required to register their charters, the facts here are sufficient for that purpose.

108 "The term 'agent' is one of wide significance. It is defined to be one who acts for another by authority from him (Webster's Int. Dic.); one who undertakes to transact some business or manage some affair for another by authority and on account of the latter, and to render an account of it. The term 'agent' may therefore be said to apply to any one who by authority performs an act for another."

1 Words & Phrases, Citing numerous authorities.

What is the doing of business?

Business is said to be a word of large significance, and to denote the employment or occupation in which a person is engaged to procure a living. (Goddard v. Chafee, 2 Allen) 395; Martin v. State, 59 Ala., 36). Under a statute that any person who shall do any manner of labor, business, etc. shall be punished, etc. the

loaning of money and taking a note therefor was held to be business within the meaning of such statute. (Troewert v. Decker, 51 Wis. 46.) In Towie v. Larrabee, 26 Me., 465, it was held that a promissory note made on Sunday for the price of a horse bought on that day, was void, as being in contravention of the statute prohibiting trade and business. In Lovejoy v. Whipple, 18 Ft. 379, the taking of a promissory note, executed upon Sunday, in consummation of am contract previously made, was considered business. "It thus seems," as said by Thurman, J., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts." (Bloom v. Richards, 2 Ohio St. 388). It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal or void, as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawfulm that violates the transaction and renders it void. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business which, being prohibited on that particular day, is void.

109 This complainant, and all other foreign corporations, are required to comply with our laws. The complainant, being a foreign corporation, could only transact business in Tennessee after doung this. No such claim was made in the complainant's bill, and, tested by the judicial interpretation above set forth, the business which it has actually done is within the prohibition of our Statutes.

The making ofn contracts in Tennessee, and having an agent here to secure other contracts, is the doing of all the business contemplated in the charter of complainant. In the absence of proof showing that it carried on business at other places, it may be proper to assume that this is th4 only business it has ever done.

In such circumstances, can the Court say that this complainant has a right to maintain this action?

The legislature of Tennessee hasm made the carrying on of business hereb by foreign corporations, without first having registered their charters, unlawful acts. Every rule of law, therefore, must be interpreted to mean that the legislature intended to prevent these acts, and as one of the act- of prevention, such foreign corporations must register their charters. Unless they have done this, and unless such business is of an interstate nature, then all contracts growing out of such business are illegal, and such foreign corporations can maintain no suit to enforce the same.

We respectfully insist, therefore, that the lower court erred in the decree entered, and that the same should be reversed and complainant's bill dismissd.

Respectfully submitted,

(Signed) JOE V. WILLIAMS,
*Sollicitor for Def't Albert.*

110 No. 2.

Filed Sept. 1, 1913. S. E. Cleage, Clerk.

In the Supreme Court of Tennessee, Knoxville Term, 1913.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et al.

Chancery Cause from Hamilton County.

*Reply Brief of Complainant-Appellee.*

## The Facts.

All the pertinent facts are, perhaps, not fully stated by appellant. In addition to the statement by appellant we submit the following:

1. The contract between the parties was in writing (R. 53), and obligates complainant, which, under its charter was permitted "To conduct and operate a general theatrical and amusement business" (Rec. 52), having an office in Chicago, Illinois, to engage for the firm of Catron & Albert, who were conducting a vaudeville playhouse in Chattanooga, troops of actors or playwrights, in this way: The complainant conducted a booking office, which was operated exclusively in Chicago, and made contracts in advance with the managers of troup-s of vaudev-lle actors, whereby the latter were "routed" over certain circuits of the coubtry, these routings being with a view to economy, continuity of territory, etc.

Complainant agreed to act as "Agent" for Catron & Albert for a weekly booking fee of ten dollars during certain seasons,
111 and in addition was to be paid a sum equal to five per centum from the salaries of the actors furnished at the theatre by the Agent (R. 53.)

2. The contract stipulated that complainant was "acting solely in the capacity of agent of said theatre owner" and was not liable for failure of the artists or troops to either arrive on time, or perform satisfactorily after they did arrive. In other words, complainants simply engaged the troops and books them out of Chicago, notifying the theatre owner sufficiently in advance for the acts to be advertised, and for this was to be paid as indicated.

3. The owners were to pay complainant weekly in Chicago by the remittances through the mails (R. 53).

4. The bill did not aver complainant a foreign corporation, but, in the caption, merely showed that it was a corporation "with its situs in Chicago, Illinois", (R. 2).

5. Complainant executed its portions of the contract faithfully from January 15, 1911, to January 8, 1912, inclusive, and was entitled under the terms of the contract to receive the booking fees and also an amount due it from the percentage collected and re-

tained by Catron & Albert altogether the sum of $1554., of which an itemized statement was sent Catron & Albert and they, through defendant—appellant—Albert, in response at the bottom of the statement endorsed:

"We certify that the above is correct according to the amounts due to date."

(Signed) "CATRON & ALBERT".
By W. S. ALBERT."

(R. 5, 7)

112 After this Mr. Albert repeatedly wrote complainant promising to pay, and never at any time claimed any set-off (R. 30-1, 35-6), and as we understand does not now deny the indebtedness. In truth, several of his letters admitting same and promising to pay it are in the record, in addition to his own evidence, which gives as his only reason for not now paying that his partner, Catron, fraudulently disposed of all or a portion of his property and left Albert to pay the entire indebtedness.

6. In addition to the scope of business, as defined by the contract, the evidence of defendant's witness confirms that the entire business of complainants was performed out of the State. (R. 20, 42-3).

*Brief and Argument.*

Appellant Albert contends that on the facts the bill should have been dismissed—

First. On demurrer, because the bill does not aver either (*a*) that complainant was doing an interstate business, or (*b*) that it had complied with our foreign corporation statutes.

Second. That on the facts it distinctly appears complainant has not complied with such statutes.

These contentions we note in their order.

I.

113 It is doubtful if the bill discloses that complainant is a foreign corporation. The recital is that its situs is in Chicago. This would clearly not state a cause of diverse citizenship within the statutes applicable to removals to the Federal Courts—and we submit therefore, that the bill does not disclose that complainant is a foreign corporation; but assuming that it does, we next insist that it clearly does not disclose that complainant had carried on, or was carrying on business in Tennessee. Moreover, it did not disclose that complainant had not complied with our foreign corporations statute.

Therefore the burden was on defendant to both aver and prove the facts above as an affirmative defense.

Thus in Young v. South Tredegar Iron Co. 85 Tenn. 200, this honorable court said it would "presume in the absence of proof to the contrary that this corporation has filed its charter with the Secretary of State, and that it is lawfully and not unlawfully exercising its faculties within this State."

And again in L. & N. Railroad v. M. & T. Railroad, 92 Tenn., 693, your Honors said:

"Moreover it does not appear that the L. & N. Railroad Co. has not complied with that Act, if it be necessary, which we are not now called upon to decide."

The fair import from each of these decisions is that in the absence of proof to the contrary the court would presume compliance with law. We understand this to be according to the weight of authority.

19 Cyc., 1319, 1322.
114 Railway Co. v. Fire Assoc., 55 Ark., 163.

The case of Carey-Lombard Lumber Co. v. Thomas, 8 Pickel, 587, cited by appellant, was a case in which it affirmatively appeared that the law had not been complied with.

We respectfully submit on the authorities above that the demurrer was properly overruled.

## II.

Our next contention is that if complainant was doing any character of business in Tennessee at all it was of an interstate character, and as such could not come under the ban of our statute.

Milan Milling Co. v. Gorten, 93 Tenn. 590;
Davis &c. Co. v. Caigle, 53 S. W. Rep. 240;
State v. Ins. Co. 106 Tenn. 294.

A further answer is that complainant was not engaged in "doing business" in this State, as contemplated by our statutes on this subject.

Lumber Co. v. Moore, 126 Tenn. 313.

This case is the latest utterance of this Honorable Court on the subject, and we submit covers every phase of the present controversy like a blanket, and upon the strength of it we are entitled to an affirmance.

Your Honors have arranged the authorities and distinguished them in the case last cited very recently, and we respectfully
115 refer thereto as the most forcible illustration of our contention that we can submit.

From the testimony of appellant Albert it distinctly appears that complainant never maintained any office, agency or place of business in Tennessee, but, as above stated, conducted the entire business out of which this controversy arises from its Chicago office, where the players were engaged, and then gave to Catron & Albert through the mails notice as to the dates of the bookings.

If Catron & Albert had complied with their part of the contract they would have remitted according to the terms of the contract through the mails the money due complainant to its office in Chicago.

Respectfully submitted,

(Signed) W. E. DRUMMOND,
C. B. MILLER,
*Solicitors for Appellee.*

116 No. 3.

In the Supreme Court of Tennessee at Knoxville, September Term, 1913.

Filed Oct. 31, 1913. S. E. Cleage, Cl*ker*; Jas. T. Joy, Deputy Cl*ker*.

No. —, Hamilton County. Equity.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

STATEMENT OF CASE, ASSIGNMENT OF ERRORS, AND BRIEF IN BEHALF OF DEFENDANT W. S. ALBERT, THE APPELLANT.

*Statement of Case.*

This suit was instituted by complainant, a foreign corporation, in the Chancery Court of Hamilton County, to recover of defendants Catron & Albert, a co-partners, $1,554 on contract.

The Chancellor gave complainant decree for the amount sued for, together with interest. Defendant Albert excepted and prayed and was granted an appeal to this Court.

There was no appeal on the part of defendant Catron, because, we assume, he had taken the benefit of bankruptcy.

The record shows the complainant is a Missouri corporation, but has an office, it seems, if Chicago, Illinois, from which it transacts some of its business. A certified copy of its character is filed in the record, and shows the corporation was formed to engage in the business of conducting and operating a general theatrical and amusement business.

117 The proof shows it came to Tennessee, and entered into a five-year contract with defendants Catron & Albert, as owners of the Airdome Theatre in Chattanooga. This contract, which is filed in the record, shows the complainant is engaged in the booking of theatrical artists—that is, for a fee and a commission, it agrees to send artists to given places, who perform for local theatre owners and managers. The contract is so worded that all these performances constitute different and separate contracts, for the reason that such are incomplete contracts unless the artists go as agreed and actually perform.

Defendant Albert contends the record shows Complainant had an agent stationed in Tennessee, who procured other and similar contracts in Tennessee and other Southern States for complainant, and that in addition, complainant sent several other agents to Tennessee, who procured and executed contracts for complainant in Tennessee. Its is also claimed by said defendant that Tennessee is the only State in which the proof shows complainant transacted its business, insofar as securing its contracts, the sole life of the

corporation, is concerned, and that therefore, complainant carried on its usual and ordinary business in this State, and because of this, it is required to register its charter in Tennessee to comply with the foreign corporation laws.

A stipulation is in the record in which it is admitted that complainant had not done this, and for this reason, defendant Albert insists complainant had no right to institute nor any to maintain, a suit in Tennessee on the contract involved herein.

This is the principal issue in this cause.

The defendant also insists that his demurrer to the bill should have been sustained. That point is thoroughly discussed in our original brief, and the only point we shall discuss here is,
118 whether or not the complainant has been engaged in carrying on its business in Tennessee to such an extent that it should have complied with our foreign corporation laws by registering its charter.

## The Proof.

The complainant introduced no proof whatever. Defendant Albert introduced the deposition of B. S. Muckenfuss, who was booking agent for complainant during the existence of the contract between complainant and Catron & Albert (Tr. 15). Muckenfuss stated he was acquainted with defendant Albert; that during the life of the contract between complainant and defendants Catron & Albert, witness was booking manager of complainant, engaged in booking vaudeville attractions throughout the country. Witness stated he believed the president of complainant had owned some property in Nashville, witness having gotten this information, as he remembered, from the complainant personally (Tr. 16). Witness stated complainant had been engaged in the booking of attractions in Tennessee, this being done from the main office of complainant at Chicago, Illinois, but that complainant had no agent or office in Tennessee, but had soliciting agents who visited that state. Witness said he, himself, had visited Tennessee, and had solicited business for complainant (Tr. 17). He stated defendant Albert had been written to repeatedly by both the president of complainant and himself, in the name of the company, asking him to use his influence in obtaining for complainant bookings of other southern theatres, and that it was through the influence of defendant Albert, to a large extent, that at least three theatres were induced to give their bookings to complainant. Witness stated defendant Albert had no written contract to represent complainant company (Tr. 17). He stated defendant Albert had performed valuable services for complainant.

119 Defendant Albert testified he, in connection with defendant Catron, operated the Airdome Theatre in the City of Chattanooga; and that prior to the making of the contract with complainant some friend in Chattanooga had solicited him, Albert, to rake the bookings of complainant. It was stated to defendant by said friend that the manager of complainant had written his friend asking him to see defendant Albert. Defendant Albert was

given this letter, and took the matter up with complainant, which resulted in the contract on file in the record (Tr. 20, 22). The contract was signed by complainant at Chicago, sent to defendants and they signed same at Chattanooga (Tr. 22). This, the original contract, was therefore a Tennessee contract.

The firm of Catron & Albert continued to take complainant's bookings for some time, and until January, 1912. Defendant Albert says the president of complainant, Mr. Muckenfuss, Miss Bloom, and a Mr. Reddick, all representatives of complainant, said Albert and asked him to represent complainant, and to use his influence with other Southern managers whom he knew personally to get them to make contracts with complainant (Tr. 22); he says Muckenfuss came to Chattanooga, spent a day or so, and personally requested defendant Albert to do this. The other requests were made in person in Chattanooga, and some were made by letter (Tr. 22).

In pursuance of this request, defendant Albert, who was at Chattanooga, began negotiations with the Southern managers of theatres to obtain contracts for complainant. He wrote many and exhaustive letters to, and personally saw, numerous Southern managers and owners of theatres, including those at Knoxville, Nashville, Chattanooga and other points. At that time none of these people had contracts with complainant, but were taking bookings from other companies. Albert says he was very successful in getting numerous theatres to enter into contracts with complainant, all of
120 which was very valuable to complainant. Albert had been in the theatre business a long time, and knew these people personally. The value of this service to complainant, according to defendant Albert, was from thirty-five to fifty thousand dollars a year (Tr. 24).

Albert filed letters from complainant's officers showing they acknowledged he had performed valuable services for complainant, among others being a letter from Carl Hoblitzell, president of complainant, in which he expressed his gratitude for everything Albert had done in behalf of complainant (Tr. 33). Another letter from booking manager Muckenfuss stated, "Every house that was secured for the Interstate Independence I secured, and you helped me get several of the houses (Tr. 37).

To show the time and trouble to which Albert went in his efforts to secure contracts for complainant, a letter written to defendants by the booking manager of complainant, dated Feb. 28, 1912, is filed in the record (Tr. 37). The proof shows that after this letter was received by defendant Albert he made a number of notations on the margin showing the value of complainant's bookings and then sent the letter to witness Sperry, at Nashville. The Court will see from an examination of this record that defendant Albert spared no time or trouble in showing the benefits that would accrue from complainant's contracts. Albert testified he was continually writing similar letters every week (Tr. 25).

Albert stated the interest of himself and Catron in the Airdome Theatre was sold to the Tennessee Realty & Leasing Co. which operated the Majestic Theatre at Chattanooga, and that subsequently

Catron had secretly sold all of his interest in said Leasing Company, became insolvent and went into bankruptcy, leaving a large indebtedness owing by said partnership of Catron & Albert for defendant Albert to pay. Albert said he was solvent, and he thought complainant would do the right thing and allow him something for his services (Tr. 26-27).

He further testified that about the time the Tennessee
121 Realty & Leasing Company was to make a payment to defendants, Mr. W. B. Miller, Solicitor for complainant, came to defendant Albert in Chattanooga, and insisted upon a payment of the $1,554 to complainant. Defendant Albert was willing and agreed for a sum equal to this to remain in the hands of the Tennessee Company pending his efforts to get a compromise with complainant, he being willing to pay $800 (Tr. 27). Albert says he was unable to make any compromise adjustment with complainant, however, and that he then received a letter from Mr. Miller, stating that the president of complainant would make no concession, and demanded full payment.

Defendant Albert stated he nor his firm were indebted to complainant, but that complainant, in fact, was indebted to defendant Albert, and that inasmuch as he had been advised that complainant could not lawfully collect the same, he declined to make payment (Tr. 27, 28).

Defendant Albert said the reasonable value of his services to complainant would be more than the amount of the claim of complainant in controversy (Tr. 29).

On cross-examination witness Albert admitted he had written and signed at the bottom of complainant's statement of account the following words. "We certify that the above is correct, according to the amounts due to date"; but he said he did this because complainant urged him to sign such an agreement while the matter was fresh, and with the understanding of the facts above detailed.

The deposition of H. L. Sperry, connected with certain theatre companies at Nashville, Tenn., was taken. He stated the representative of complainant came to Nashville and entered into a contract or contracts to furnish bookings there (Tr. 37, 38). Witness Sperry testified he understood the complainant had purchased valuable real estate in Nashville for the purpose of erecting upon
122 the same a theatre, this real estate being the site of the old Board of Trade Building. He said this information came to him from Mr. Chateau, agent of complainant, at Nashville in 1911. He said before he made his contract with complainant's representative at Nashville, that Mr. Chateau threatened, if contract was not made, that complainant might put up a theatre building on this lot (Tr. 40).

Witness Sperry also testified that defendant Albert had solicited him a number of times, by letter and otherwise, to make contracts for his theatres with complainant (Tr. 40, 41). Sperry filed various letters from defendant Albert (Tr. 37).

Defendant Albert also took the deposition of another Nashville theatre man, Tony Sudekum, who testified that he and his associ-

ates at Nashville had entered into a contract at Nashville with a Mr. Renne, as representative of complainant, for bookings for Nashville theatres. (Tr. 48, 47).

The above proof stands wholly uncontradicted in the record.

*Assignment of Errors.*

I.

The Court erred in overruling the demurrer of defendant Albert.

II.

The Court erred in gving complainant a decree against the defendant W. S. Albert, for the sum of $1,693.86 and costs, or any other sum.

*Brief and Argument.*

I.

123 Defendant Albert's demurrer raised the question of whether or not the bill was defective in that it showed the complainant, a foreign corporation, sued on an account and contract made in Tennessee, and yet failed to allege that it had complied with the Tennessee Statutes by having its charter registered with the Secretary of State. The Chancellor overruled the demurrer on the ground that it was a speaking demurrer.

Appellant contends, under the definition of "speaking demurrer" as given at Sec. 307 of Mr. Gibson's Suits in Chancery, that this demurrer was good, and was not subject to such objection.

It is also our contention that inasmuch as our Statutes make the doing of business in Tennessee unlawful, and prescribes a penalty therefor, that a foreign corporation which sues in the Courts of Tennessee, on a Tennessee contract, must, as a condition precedent, allege in the original complaint a compliance with the Statutes. Either this must be done, or the bill must show that the contract sued upon grew out of a transaction involving Interstate Commerce. The bill in this case alleges neither of these things.

We discuss this question thoroughly in our original brief, and content ourselves with what is there said to substantiate our insistence.

II.

We insist the proof abundantly shows that the complainant, a foreign corporation, cannot maintain this action for the reason that it appears to have been engaged in carrying on its business in Tennessee, other than Interstate business, and that not having complied with the Tennessee Statutes as to foreign corporations, it cannot lawfully maintain this proceeding.

The first act we have in Tennessee on this subject is Chapter 31 of the Acts of 1877. The terms of this Act apply only to
124 foreign corporations organized for mining and manufacturing purposes. In the second section of this Act it is provided

that such corporations desiring to carry on business in Tennessee should first file in the office of the Secretary of State a copy of its charter, and also cause an abstract of its charter to be registered in the office of the register in each county of the state in which it is proposed to carry in business or to acquire land.

The next Act touching the question is Chapter 122 of the Acts of 1891. This Act amended the Act of 1877 so as to apply to all corporations which might desire to carry on business or own property in Tennessee, and by Section three of this Act it is provided that it is "unlawful for any foreign corporation to do or attempte to do any business or to own or to acquire any property in this State without having first complied with the provisions of this Act"; and it is provided in another section that a violation of these provisions shall subject the offender to a fine of nor less than $100. and not more than $500.

The next and final Act on the subject is Chapter 81 of the Acts of 1895. This is an amendatory Act of the Act of 1891 above referred to, and provides for the authentication of copies of charters to be filed with the Secretary of State and for abstracts of same to be registered in the county register's office in each county where such corporation desired or proposed to carry on business.

The body of this Act does not in any wise change the Act of 1891, insofar as our contention is concerned.

The péculiar wording of this Statute of 1891, as to the owning of property on the part of foreign corporations, is construe- by this court in the case of Louisville Property Co*L*. v. Nashville, 6 Cates, 213, shows that such foreign corporations may own property in Tennessee without registering their charters, and to this effect the
125 amendatory statute of 1895 changes the provisions embodied in the Statute of 1891 with respect to ownership of property.

The effect of this Statute of 1891, therefore, which is controlling upon the point for which we insist here, is that it "is unlawful for any foreign corporation to do business or attempt to do business in this State without first having complied with the provisions of this Act"; and the point for decision, therefore, is whether or not this record shows that complainant had been engaged in doing business in Tennessee, it being admitted that it is a foreign corporation, and that it has never attempted to comply with these Statutes by registering its Charter.

It was held by this Court, in the case of Cary-Lombard Lumber Co. v. Thomas, 8 Pickle, 587-597, that every transaction or contract performed in Tennessee on the part of a foreign corporation which had not domesticated itself, was illegal.

It was said by this Court, in the recent case of Lumber Co. v. Moore, 18 Cates, 313, that before a foreign corporation is amenable to these Statutes, it must be shown that it has been engaged in the carrying on of its usual and customary business within the borders of Tennessee, and that merely having an agent and maintaining an office in Tennessee where the usual and customary business of such corporation has not been done, does not make it necessary for such corporation to register its charter. In other words, a foreign corpora-

tion can have both an office and agent in Tennessee, and yet, if it does not carry on its usual and ordinary business in the State, it does not have to domesticate itself.

So, it seems, the inverse of this proposition is true, namely that such foreign corporation is required to domesticate itself where it carries on its usual and ordinary business and this we insist is necessary even though it has no office or agent.

126 This is a sound principle, and we believe is in harmony with the weight of the authorities throughout the country.

The test, therefore, as defined in the case of Lumber Co. v. Moore, Supra, is whether or not complainant corporation has been carrying on its usual and ordinary business in Tennessee.

Complainant entered into a contract which was executed in Tennessee, this being the contract between it and Catron & Alberty and growing out of which are other contracts, all of which were to be performed in Tennessee. These booking fees and commissions were not to be paid unless the artist or artists actually came to Chattanooga and performed in defendants' theatre. This, therefore, made all these hundreds of performances separate and distinct contracts, and contracts wholly incomplete until the artists came and performed in Chattanooga.

Besides this, defendant Albert, at the request of complainant and its officers, acted as agent of complainant, in soliciting other contracts in Tennessee and other Southern States. Albert maintained an office in Chattanooga, and wrote several hundred letters to theatre people in Tennessee and other states, and secured many valuable contracts for complaimant. In addition, the proof shows complainant sent its representatives to Nashville, who entered into one or mmore written contracts at Nashville, and further, this suit is based upon a contract executed at Chattanooga which complainant claims it had made by and through its solicitor, Mr. Miller, with defendant Albert and his solicitor.

The question for determination, therefore, is was this the doing of the usual and customary business of the complainant within the borders of Tennessee.

Our statutes make it "unlawful for any foreign corporation to do or attempt to do any business", etc. in Tennessee, without first having registered its charter, etc.

127 Language of similar import has been construed by the Supreme Court of Alabama and the United States Supreme Court so as to require a corporation to comply with State Statutes even though but one transaction be shown.

Article 14 of the Alabama Constitution ordains that no foreign corporation "shall do any business" in that state without having at least one known place of business and an *un*authorized agent or agents therein. The Code of that State (Sec. 1313 Code 1893) provides that every foreign corporation "before engaging in or transacting any business" in the State, shall file a statement in writing, designating its place of business and appointing an agent. These provisions are not more restrictive than the Tennessee Statutes, and yet in the cause of Farrior v. New England Mortgage Security Co., 88

Ala., 275, it was held that such provisions were violated by the doing of a single act of business by a foreign corporation in the exercise of its corporate functions.

To the same effect is the case of Chattanooga Building, etc. Association v. Denson, 189 U. S., 408, which construes the same constitutional and Statutory provisions.

128 In the case of State v. Standard Oil Co., 110 S. W. 565, this Court held that foreign corporations have no inherent power to do business in the State, and are mere "guests".

In the case of Cooper Manfg. Co. v. Ferguson, 113 U. S. 727, the Court defined the doing of business as follows:

"What meaning and what limits are to be assigned to the statutory phrase "to do business" is a matter of elaborate argument by counsel. Taking the language in its ordinary accentation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise it establishes its business relations, assumes obligations, and acquires rights. It is submitted that this opinion of the State Court should be accepted here as a correct interpretation of these provisions of its laws. It is said by counsel "that the making of such a single isolated contract is not doing business in the State in the sense contemplated by the foregoing provisions." If it is nor doing business, how many isolated contracts are required to constitute "any business" within the meaning of the prohibition? The most extensive business that may be carried on is made up of individual transactions or isolated contracts. If the continued and regular business is unlawful, how can any one in the series of contracts of whom the continued and regular business is composed of be lawful. No sound argument can be made from the hardship of the case."

We contend, in the light of this record, that complainant transacted business in Tennessee, by and through its regularly appointed agent, who had an office and maintained a business for complainant in Tennessee.

Albert was designated by complainant, according to the proof, to act as its agent, and in pursuance of this relation he undertook to transact the complainant's business in Tennessee.

129 Eeven if a foreign corporation in Tennessee must have an maintain an office and agent in the State before it becomes necessary for it to register its charter, the complainant is amenable to our Statutes for the reason that Complainant represented it in this capacity.

"The term 'agent' is one of wide significance. It is defined to be one who acts for another by authority from him (Webster's Int. Dic.); one who undertakes to transact some business or manage some affair for another by authority and on account of the latter, and to render an account of it. The term 'agent' may therefore be said to apply to any one who by authority performs an act for another."

1 Words & Phrases, p. 262, citing numerous authorities.

What is the doing of business?

Business is said to be a word of large significance, and to denote the employment or occupation in which a person is engaged to procure a living. (Goddard v. Chafee) 2 Allen, 395; Martin v. State, 59 Ala. 33). Under a statute that any person who shall do any manner of labor, business, etc. shall be punished, etc., the loaning of money and taking a note therefor, was held to be business within the meaning of such statute (Trowert v. Decker, 51 Wis. 46). In Towle v. Larrabee, 26 Me. 466, it was held that a promissory note made on Sunday for the price of a horse bought on that day, was void as being contravention of the statute prohibiting trade and business. In Lovejoy v. Whipple, 18 Vt. 379, the taking of a promissory note executed upon Sunday in consummation of a contract previously made, was considered business. "It thus seems," as said by Thurman, J., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts." (Bloom v. Richords, 2 Ohio St. 388). It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal or void, as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawful,
130 that vitiates the transaction and renderss it void. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business which, being prohibited on that particular day, is void.

The case of Elliott v. Parlin & Orendorff Co. 71 Kansas, 665, is directly in point for the defendant.

In that case a non-resident corporation sued in Kansas. The issue raised by the Answer was that complainant had not complied with the Kansas Statutes requiring a foreign corporation "doing business in Kansas" to first register its charter, etc. The complainant in that case was a manufacturing company organized and existing under the laws of Illinois. It had a branch house in Kansas City, Mo., in charge of a managing agent, for the purpose of distributing its goods. At and prior to the time it instituted the suit in question in the Court of Kansas, this Missouri branch house had five men, whose residences, the opinion states, were not given, in the State of Kansas soliciting orders for implement dealers. These orders were signed by the Kansas people at their places of business in that state and the orders directed the shipment of machinery from Kansas City, Mo. It was stipulated in the orders that the title to the property sold was to remain in the seller until paid for.

The Supreme Court of Kansas held that this was "a doing of business in Kansas," and in passing upon the question, said:

"Can it be said as a proposition of law that goods shipped under the written contract, parts of which are herein quoted, were delivered to tge carrier in Kansas City, Mo., as the property of the dealer in Kansas? Or can it be said as a proposition of law that the employer in sending men over the state of Kansas to make such contracts with implement dealers in the state is not doing business

in the state of Kansas? Or can it be said that the sending of agents to the state of Kansas to settle accounts and to receive cash or promissory notes in settlement thereof is not doing business within
131 the state of Kansas? We are obliged to answer all these questions in the negative. If these questions should not be answered affirmatively, as a question of law, they should have been submitted to the jury under proper instructions to be answered as questions of fact.

"Paraphrasing the language of Mr. Justice Peckham, in the case of Lumbermen's Ins. Co. v. Myer, 197 U. S., 407, 25 Sup. Ct. 483, 49 L. Ed. 810, we think it would be somewhat difficult if it was not doing business therein, when sending its agents into the state to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out. When the plaintiff shipped goods to dealers in Kansas under the contract which we assume was good between the Parlin & Orendorff Company and the dealer, the title and right to possession of the goods remained in the company until the dealer paid for them; and, supposing that the dealer paid an agent of the company sent to Kansas for the purpose of making settlement of the claim, the payment being made in Kansas, was not the real sale of the goods made in Kansas? We think it was. The method of business of the plaintiff company seems to have been that it shipped the goods to the dealer ordering them with the understanding that the dealer should pay the freight, hold the goods as his profit all that he received over and above the price at which the goods were listed to him. If so, the Kansas dealer was virtually the resident agent of the Parlin & Orendorff Company for the sale of its goods—that is as between the company and the dealer, and we are not called upon to determine the effect of the contract as between the dealer and any third party or as between the company and any third party."

The case of Diamond Glue Company v. U. S. Glue Co. 187 U. S., 611, is also in point.

That was a suit instituted in the United States Circuit Court in Wisconsin by an Illinois corporation against a Wisconsin corporation, to recover damages for breach of contract.

It was shown that Wisconsin had a statute requiring corporation-incorporated elsewhere to file copy of their charter with the Secretary of State, and to pay a small fee as a condition precedent to doing business in Wisconsin. It was admitted that plaintiff, a foreign corporation, had not complied with this statute, and defendant relied upon the fact that the contract was one to do business in Wisconsin. The lower Court sustained this defense, and this judgment was also sustained by the U. S. Supreme Court in an opinion delivered by Mr. Justice Holmes. The opinion sets out the
132 nature of the contract, the business that was being carried on, etc. That part of the opinion in relation to the question in controversy is as follows:

"The contract was one by which it was agreed that the plaintiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have

the management of the manufacturing on the same and should operate it for the defedant; that its officers should give the factory such personal supervision as might be necessary, and give the defendant in the management and operation of the factory the benefit of their experience and of the plaintiff's; that the plaintiff should furnish and keep the defendant supplied with a superintendent; that it should control, handle and sell the entire output of the factory; that it should refrain from manufacturing hide or calf glues at any of its own factories; and that it should guarantee payment on all sales made by it and should receive certain commissions for its services. The contract was to run for five years from the time that the plant was finished and began work. It was understood that the proposed factory was to be in Wisconsin. A site was selected near Milwaukee, and in a little over a year from the date of the contract, on July 25, or 26, 1899, the plant was built and put in operation.

"The section of the Wisconsin statutes relied on by the defendant stated more at length, forbade corporations organized otherwise than under the laws of that State to transact business in the State until they should have filed a copy of their charter with the Secretary of State, which act, by the same statute, constituted the Secretary of State the attorney of the co rporation for the service of process. A failure to comply with any of the provisions of the section subjected the corporation to a fine. It was provided further that every contract made by such corporation affecting the personal liability thereof or relating to property within the State before compliance with the section should be wholly void on its behalf, but should be enforceable against it. A fee of twenty-five dollars was to be paid for filing the charter. See Ashland Lumber Co. v. Detroit Salt Co. 89 N. W. Rep. 904.

"According to the undisputed testimony of the plaintiff's vice president, who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with a view to the carrying on of business in that State by the plaintiff, the law of Wisconsin must be applied. London Assurance v. Compania De Moagens do Barreiro, 167 U. S. 149; Graves *b.* Johnson, 156 Mass. 211. There is no controversy on this point. But it is said that the contract did not contemplate the carrying on of business by the plaintiff in Wisconsin, that at most it is ambiguous, and that practically it was construed in accordance with the plaintiff's contention. The declaration is on the contract, and by the plaintiff must stand or fall. We see no ambiguity in its terms. The plaintiff was to have the management of the manufacturing, was to operate the factory or at least to assist in operating it and to keep it supplied with a superintendent. It did assist in operating by
133 its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain. It called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter

was forbidden by the laws of the State. See Mutual Life Ins. Co. v. Spratley, 172 N. S. 602, 611."

* * * * * * *

"It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was no- so concerned, and the inseparable privisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the state or not. The foundation of the commerce outside the State was doing business within it. The superintendents and manufacturers had to come before the sale. The small requirements of this act before allowing the plaintiff to do business in the State, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere. United States v. E. C. Knight, 156 U. S. 1, 13; Hopkins v. U. S. 171 U. S. 578, 594. The interference with the regulation of commerce between the states is more remote than when a bridge between two states, or the franchise of a domestic corporation created with the intent to carry on such commerce, is taxed. See Henderson Bridge Co. v. Henderson City, 173 U. S. 592; Central Pacific R. R. Co. v. California, 162 U. S. 91, 126. In modern societies every part is related so organically to every other that what effects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn and distinctions of degree must be made."

It was further said in that case:

"A prohibition (referring to the Wisconsin foreign corporation statutes) in this case is not absolute, but is only conditional on the failure to deposit a copy of the plaintiff's charter and pay a small fee. It is merely incident- to a regulation which, but for the contract in question, would be proper, and which is familiar in the laws of the states. It can be avoided by compliance with the regulations."

The complainant insists the business which it has done in Tennessee was business growing out of commerce between states.
134 Measured by the test applied by the United States Supreme Court in the case of International Text Book Co. v. Pigg, 217 U. S. 91, the business which the complainant has carried on in Tennessee is not interstate commerce. In that case it was held that importation into one state from another is the indispensable element, the test of the interstate commerce. Where is the element of importation from one state to another involved here? The complainant sent some of its agents into Tennessee, but they made the contracts in question here in Tennessee, which contracts were to be here performed. Another agent, defenda-t Albert, resided in Ten-

nessee and while in the state he carried on extensive operations for the complainant. The element of importation is lacking altogether in the business which it has been shown the complainant has been carrying on in Tennessee.

Another test, and second in importance only to the above, is that to constitute interstate commerce, it must be so in fact and not only in intention. This principle was enunciated in the opinion of the circuit court in the case of Diamond Glue Co. v. United States Glue Co. 103 Federal Reporter, 838, in which it was held that the intention to ship manufactured goods to other states does not make a contract for the operation of a factory for their manufacture relate to interstate commerce, in a constitutional sense, so as to exempt from the operation of state laws. Whatever, therefore, the complainant intended to do from its Chicago office, or whatever its intentions were as to its business in general, the record shows that it carried on no business whatever which can be denominated commerce between states; but that its business, or its principle business, was carried on within the borders of Tennessee.

It makes no difference, however, whether the corporation does both an interstate and an intra-state business. A statute requiring foreign corporations to file a copy of their charters and to*m* pay a fee of $25.00 applies to a telegraph company engaged in intra-state business, even though it is also engaged in interstate business,
135 and a penalty of $1,000.00 for not doing so may be collected.
Western Union Tel. Co. vs. State, 101 S. W. (Ark.) 748.

A State has power to impose reasonable terms upon the right of a foreign corporation to carry on interstate commerce, even though such corporation may also be engaged in interstate commerce.

Osborne v. Florida, 164 U. S. 650.
Pullman Co. v. Adams, 189 U. S. 420.
Allen v. Pullman Co. 191 U. S. 171.
Western Union Tel. Co. vs. State, 101 S. W. (Ark.) 748.

Tested by every rule, we believe the complainant had no right to institute this suit, and that the decree of the lower court should be reversed and complainant's bill dismissed.

Respectfully,

THOMPSON, WILLIAMS & THOMPSON,
*Solicitors for Defendant.*

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No. 4.

Filed Nov. 13, 1913.

S. E. Cleage, Clerk.

Supreme Court of Tennessee, Knoxville, Term 1913.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et al.

Chancery Cause from Hamilton.

*Memorandum for Complainant-Appellee.*

Copy of this memorandum has been furnished adverse counsel. Yesterday, in lieu of argument, I was privileged to submit citations in this form on what was understood from the Court to be pertinent—(1) was complainant doing business in Tennessee? and (2) was same a chara-ter of business that the state could regulate or was it interstate commerce?

There are two errors assigned, but one of them deals with a demurrer and adversary counsel at bar yesterday waived the first error assigned and conceded the demurrer was properly over-ruled.

I.

Was complainant "doing business" in Tennessee? This makes it necessary to notice the contract. (R. 53-4.) Fortunately, it is in writing, was made by mail—mailed from complainant's office in Chicago to defendants' office in Chattanooga there executed by defendants and returned by mail.

Complainant is a booking concern, making contracts with artists, playwrights, actors, etc., from its office in Chicago, by correspondence or otherwise, whereby they agree to furnish certain attractions, perform feats, produce plays, etc. in various play houses throughout the country. They are routed and the various routes are called "circuits". A circuit comprises various states. Chattanooga is in the southeastern circuit, composed of the southeastern states. The circuits are arranged with respect to railroad facilities, patronage, etc. looking to economy.

137 The complainant is a middle-man or go-between, serving both the theatre owners on one side and artists, playwrights and actors on the other. It serves both and is paid by both.

The firm of Catron & Albert were the proprietors of the Airdome—a theatre or play house in Chattanooga. They contracted with complainant to book for them for a period of 5 years attractions for their play house, for which they agreed to pay $25. weekly.

The artists which complainant was to obtain to perform agreed to pay complainant a sum equal to a percentage of their wages while

earned on the various circuits,—and this is provided for in the written contract, the defendants agreeing that they will collect the sum owing complainant from the artists or actors and remit it weekly with the booking fee of $25. by mail, without charge.

Complainant did not guarantee performance by the artists. The contract expressly so states. The contract recites complainant is only the agent of the theatre owner in engaging the artists, and does not guarantee their arrival on time or that they will perform—but it will consistently urge them to do so.

Matters progressed until defendants owed over $1,500. for booking fees and moneys collected, in January, 1912. At that time the debt was $1,554. an itemized statement was sent defendants and they signed an indorsement, reading:

"We certify that the above is correct according to the amounts due to date."

(Signed) CATRON & ALBERT,
By W. S. ALBERT."

Defendant Albert repeatedly testified he was legally and honorably bound to pay this def't, that he had no defense against the same and his only plea was that complainant should give him a credit because his partner, Catron, had failed. He was asked:

138 "Q. 40. And more than once during the months that followed you promised to pay, didn't you?

A. I believe I did."

(R. 30, 31, 34-5.)

Prior to suit, Mr. Albert went to a debtor of his, asked the debtor to *without* $1,554. to pay this debt. He then asked complainant to waive a p-rt of the debt because of his partner's failure, and when this was declined he refused to pay, and this suit followed.

Thus, the debt is — good faith, just and quite past due.

Albert made a feeble pretense of having rendered certain service to complainant, bit in cross-examination he conceded he was not entitled to any credits, rendered no service with the expectation of charging, and did nothing for complainant except with a view of benefiting himself as a direct result, in that if more play houses through the south patronized complainant as a booking office, he (Albert) would receive cheaper service from the artists thus booked. This was confirmed by his witness, Muckenfuss. (R. 19-20).

The defense interposes is that the arrangement above constituted "doing business" in this state, that complainant is a foreign corporation and has not complied with our laws. It conceded it had not complied.

Was the execution of this contract by complainant, booking plays in Chicago, a doing of business by it in Tennessee? It would seem to ask the question is to answer it in the negative.

The character of business contemplated by our statute is defined by this court in Lumber Co. vs. Moore, 126 Tenn. 319 thus:

"Unless the agency in Memphis was maintained for the general prosecution of the Company's ordinary business within this

state, then the maintenance of such agency did not constitute a doing of business in the state within the meaning of the statutes."

139 In that case, the corporation maintained an agency in Memphis. In the present case, all the elements of doing business are lacking.

(1) Complainant maintained no office in Tennessee. Its office was in Chicago and defendants were, under the contract, to remit to it in Chicago.

(2) It had no agency in Tennessee. Its agency force was in its office in Chicago. Mr. Albert maintained he was an agent, but there is no basis for his claim. It is purely ephemeral. He wrote a few personal letters as a courtesy, to some theatrical people over the South, asking them to favor complainant's manager as his (Albert's) friend. He charged nothing, was promised nothing, received nothing, expected nothing. He had no commission, no contract of agency, no powers, no duties.

Tested by the quotation from Lumber Co. vs. Moore above, "the general prosecution of the company's ordinary business" was conducted only from the Chicago office. Thus, the defense of doing business in violation of our statutes is not made out. Your Honors have but to follow the most recently published opinion of this Court in Lumber Co. vs. Moore, 18 Cates, 319, in deciding this point. Unless it is overruled this case must be affirmed.

## II.

Whatever business complainant did was interstate business and, as such, no restriction could be placed therein, as under Section 8, federal Constitution, Congress has the exclusive power "to regulate commerce among the several states." The foreign corporation statutes of a state cannot infringe or impair that right. Cooper Mfg. Co. vs. Ferguson, 113 U. S. 727.

In the above case, it is said:

"It is clear that the statute cannot be construed to impose

140 upon a foreign corporation limitations of its right to make contracts in the state for carrying on commerce between the states, for that would make the Act an invasion of the exclusive right of Congress to regulate commerce among the several states."

If your Honors can in any view of this case concede that complainant was "doing business" in this state, then complainant hereby respectfully invokes the protection of Sec. 8, sub-sec. 3, of the federal constitution, and claims the benefits thereof, for that whatever business was done was interstate commerce.

Your Honor recognized the rule contended for in Milan Milling Co. vs. Gorten, 93 Tenn. 500, it being there said:

"Where a foreign manufacturing corporation that has not complied with our statutes contracts with a resident to furnish, deliver and put in position for him, within this state, certain mill machinery, and accepts for the work and materials furnished the purchaser's notes for deferred payments secured by mortgage upon real estate situated within this state, the transaction constitutes interstate com-

merce, not subject to regulations by state laws, and the notes and mortgages are valid and enforcible."

The subject of the contract need not be machinery, but may consist of either animals, people or inanimate objects.

Thus, in Farris vs. Henderson, 1 Okla. Rep. 394, it was ruled that driving cattle from one state to another was interstate commerce.

In Butler, etc. Shoe Co. vs. Rubber Co. 156 Fed. commerce was thus defined:

"* * * but all interstate commerce is not sales of goods. Importation into one state from another is the indispensable test of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

Various federal decisions are then cited.

And the case of International Text Book Co. vs. Pigg 217 U. S. 91 is precisely in point. It is there ruled that a correspondence school, conducted in one state, which sent its local agents and 141 solicited business in an adjoining state and collected moneys from citizens thereof, was engaged in a species of commerce not subject to state regulation. I submit the Bigg case is in principals absolutely controlling.

In adverse counsel's brief it is intimated that complainant did business through Albert as agent. But there is no basis for this claim. The business charged for and conducted was from the Chicago office—the booking. Whether the actors appeared or not, defendants owed the $25 weekly booking fee. If the actors appeared, defendants were to collect and remit certain payments made by the actors, and these payments were made for complainant's account.

First, complainant did not do business in Tennessee, and, secondly, if it did, it was interstate commerce. Therefore, there should be an affirmance. The defense is an afterthought and, we submit, without merit in law, equity or morals.

Respectfully submitted,

(Signed) W. B. MILLER,
*Solicitor for Complainant.*

The cases of Association vs. Denson, 189 U. S. 108, Elliott vs. Parlin, etc. Co. 71 Kan., 665, Diamond Glue Co. vs. U. S. Glue Co. 187 U. S. 611, cited by defendant are simply not in point and in no wise apply to the case in hand. They are sound in principle, but they might as well be cited in any other case as in this one—because the facts in them are wholly different from the present.

142 No. 5.

Filed Nov. 29th, 1913. S. E. Cleage, Clerk.

Supreme Court of Tennessee, Knoxville Term, 1913.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et al.

*Petition for Complainant.*

Chancery Cause from Hamilton.

To the Honorable Court:

At or near the commencement of the present term, the above styled cause was submitted on briefs by the respective parties. Subsequently, the case was placed on the docket by direction of this Honorable Court, for argument. Thereupon on 11th inst., complainant's solicitor appeared before your Honors to present this cause orally, when same was not reached—and, at the suggestion of adversary counsel, who was then present, and by the consent of your Honors, obtained in open Court, it was again agreed to submit this cause on brief, with leave to complainant to file a further or supplemental brief in support of its contentions herein.

Thereupon, on November 13th, complainant forwarded to the Clerk for filing, and is advised that on November 14th there was filed herein, such additional brief or memorandum, entitled "Memorandum for Complainant—Appellee," a copy of which is attached hereto and made part hereof, marked Exhibit No. 1.

On November 11th, when the second agreement to submit on briefs was made, respondents' solicitor, Hon. J. V. Williams in open Court stated to your Honors that the first error assigned herein by appellant was waived, and that said appellant relied only and alone on the second error assigned.

At the same time, his Honor, Mr. Justice Buchanan, stated the controlling question in the case was as to whether or not
143 complainant was barred of recovery by reason of its failure to comply with the Foreign Corporation Statutes of Tennessee.

Petitioner is informed and avers the previous announcement that the case should be placed on the docket for argument was made through Mr. Justice Buchanan—who subsequently and on 22nd inst. rendered the opinion of the Court complained of herein.

On 22nd inst. petitioner is informed and avers that this Honorable Court, through Mr. Justice Buchanan, announced and held that this cause should be and was thereby dismissed.

II.

Under Rule 32 of this Honorable Court, petitioner has ten days during the continuance of the term within which to present this

cause for re-hearing and re-examination, and it avers that this Court is in session at the date of filing this petition and has been since the decree of dismissal here complained of.

Petitioner further avers that it has furnished to adversary counsel a copy hereof, as is attested by acknowledgment endorsed below and otherwise complied with the rules.

III.

Petitioner avers that the subject of this controversy is an indebtedness of $1,554, itemized and assented to by the firm of Catron & Albert, composed of defendants F. M. Catron and W. S. Albert, who endorsed on and beneath said itemized statement—

"We certify that the above is correct, according to the amounts due to date. Catron & Albert, by W. S. Albert."

That said endorsement was made on or about January 1912, and that the sole defense presented herein at any time consisted of the two-fold assignment of error by defendant Albert in this Honorable Court, reading thus:

144 1.

"The court erred in over-ruling the demurrer of defendant Albert.

2.

The court erred in giving complainant a decree against the defendant W. S. Albert for the sum of $1,693.86 and costs, or any other sum."

Further, that under the statement of counsel at bar, as aforesaid, the first error assigned was waived, and that hence the sole defense arises on the second error assigned, which presented for your Honors' decision, as shown in the previous briefs of petitioner, particularly the one filed about November 14, 1913, the following contentions:

(1) Petitioner is not barred from recovery, because it was not engaged in "the general prosecution of its ordinary business within this state, and did not maintain an agency or otherwise carry on business therein," as ruled by your Honors in the case of Lumber Co. vs. Moore, 126 Tenn. 313.

(2) But assuming that all business transacted by petitioner—instead of being transacted at its Chicago office, as it submits is shown by the contract between the parties herein and also the extraneous evidence—had been and was transacted in Tennessee, then such business was interstate commerce, which could not be regulated, inhibited or forbidden by the State of Tennessee through the Legislature or otherwise. And in this respect petitioner invoked the protection of Sec. 8, sub-sec. 3, Art. 1 of the federal constitution, "and claims the benefits thereof, for that, whatever business was done was interstate commerce."

(3) In addition to the foregoing, as pointed out in the previous briefs, your Honors held in Milan Milling Co. vs. Gorten, 93 Tenn. 500, that interstate commerce was not subject to regulation of this

state; and in Lumber Co. vs. Moore, supra, your honors had
145 likewise held that before a foreign corporation was amenable to the foreign corporation statutes of this State, it must be engaged in "the general prosecution of its ordinary business within this State."

And now, in addition to the contentions above, petitioner most earnestly submits that to deny to it the benefit of the ruling in Lumber Co. vs. Moore, supra, as to what constitutes "a doing of business in Tennessee," or, secondly in case petitioner is found to have been doing any business in the State, to deny to it the benefit of the ruling in Milling Co. vs. Gorten, supra, is in effect to deny to it "the equal protection of the laws," as contemplated and inhibited by Sec. I, Art. XIV, Amendments to the federal constitution.

(4) Petitioner further now most earnestly submits that the foreign corporation statutes aforesaid are unduly restrictive of and impair the right of contract, a property right guaranteed and protected against deprivation by due process of law by Articles 5 and 14 of amendments to the federal Constitution. And it respectfully submits that to deny to it the right to collect its admitted indebtedness from the defendant Albert, because of its failure to comply with the foreign corporation statutes of Tennessee, is both to deprive it of its property without due process of law, as contemplated and forbidden by Articles 5 and 14, amendments to the federal Constitution, and is also to respect and enforce a "law impairing the obligation of contracts" as forbidden by Sec. 10, Art. 1 of the federal Constitution.

Wherefore and for all the reasons above, petitioner again respectfully invokes the construction and enforcement of Sec. 8, Art. 1, sub-sec. 3, of the federal constitution touching the regulation of interstate commerce by Congress, and by implication for-
146 bidding the states to regulate same; likewise, Sec. 10, Art. 1, forbidding any state to pass a law impairing the obligation of contracts; also articles 5 and 14 of amendments to the federal Constitution, forbidding the deprivation of property without the due process of law, and forbidding a state to make or enforce a law which shall or may deprive any person of property without due process of law; and, finally, of Art. 14 of amendments to said Constitution forbidding any state to deny to any person within its jurisdiction the equal protection of the laws.

Petitioner has been informed that a written opinion will be filed in this cause for publication, but it is advised by the Clerk that as yet no opinion has been filed. Consequently, in presenting this application, it cannot foresee or know what your Honors may hold, adjudicate and decree with respect to the contentions aforesaid—but it most respectfully prays:

That your Honors adjudge and decree whether the aforesaid federal constitutional provisions apply and what effect they have.

And may it please your Honors to hold and decree, by reason of said provisions, petitioner is entitled to have an affirmance of the decree herein in its favor, as rendered by the Chancellor.

(Signed) W. E. DRUMMOND,
W. B. MILLER, *Solicitors.*

I acknowledge receipt of a copy of the foregoing on this November 28, 1913.

(Signed) JOE V. WILLIAMS,
*Solicitor for W. S. Albert.*

147 No. 6.

For Publication.

Buchanan, Judge.

Filed November 28, 1913. S. E. Cleage, Clerk. Jas. T. Joy, Deputy Clerk.

In the Supreme Court of Tennessee, September Term, 1913.

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

*Opinion.*

The Amusement Company when it made the contract on which this suit must stand or fall, when each item of the stated account on which it sued accrued, and when it brought this suit and at the trial thereof, was a foreign corporation guilty of non-compliance with our statutes in respect of "all corporations chartered or organized under the laws of other states or countries for any purpose whatsoever which may desire to do any kind of business in this state." The statutes above referred to are Chap. 31, Acts 1877, Chap. 122, Acts 1891, and Chap. 81, 1895.

And so, by way of defense to this suit, W. S. Albert, one of the defendants, set up the above facts in bar of the right of the Amusement Company to maintain this suit. He also made the defense of set off, which is not sustained by the proof, and will
148 not be further noticed.

By Article 1, Sec. 8, of the Constitution of the United States, one of the powers conferred upon Congress is "to regulate commerce with foreign nations, and among the several states, and among the Indian tribes." This grant of power to Congress has been held by implication to exclude the several states from the exercise of such powers except by consent of Congress. Railroad vs. Harris, 99 Tenn., 15 Pickle, 409, and authorities there cited.

In Brennan vs. City of Titusville, 153 U. S., 289, Law Ed. 719, Mr. Justice Brewer, in the opinion of the court, said: "It is well settled that nothing that is a direct burden upon interstate commerce can be imposed by the state without the consent of Congress, and that silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free."

It is first insisted for the Amusement Company that the business

out of which the account arose under the contract was commerce between different states, and, therefore, that our statutes referred to above have no application to, or affect upon, the contract, the account, the business done under the contract, nor upon the right of the Amusement Company to recover in the suit. This insistence, if sound, would result in our affirmance of the decree of the Chancellor for $1,693.86 in favor of the Amusement Company. To sustain the above insistence, Milan Milling Co. vs. Gorten, 93 Tenn., 9 Pickle, 589, is cited. We approve that case.

But can the first insistence of the Amusement Company be sustained under the facts of the present case? To answer this
149 question requires a brief review of the facts.

The Interstate Amusement Company brought this suit by original bill in the Chancery Court of Hamilton County on February 5th, 1913, against W. S. Albert, Fletch Catron, and the Tennessee Realty and Leasing Company, a corporation under the laws of Tennessee.

The bill shows that the complainant is a corporation with its situs in Chicago, and that each and all of the defendants are domiciled in the County and State where the suit is brought.

That defendants Fletch Catron and W. S. Albert were formerly partners doing business under the firm name of Catron & Albert, and as such firm became indebted to the Interstate Amusement Company in the sum of $1,554.00, as shown by a statement of account certified to be correct by signature of the name of Catron & Albert, by W. S. Albert.

The corporate defendant was shown to have in its hands a certain sum of money more than sufficient to satisfy complainant's demand; and it was the purpose of the bill to impound that fund for the satisfaction of the decree prayed for against the other defendants. Before the suit was brought, Catron had become bankrupt, and while he answered, made practically no defense to the suit. The corporate defendant made the usual answer of a mere stakeholder without other interest in the suit, and W. S. Albert set up the two defenses to which we have heretofore referred. The complainant relied on its account stated, and took no proof; and all of that which appears in the record was on behalf of the defendant Albert.

From the record, it is clear that, while the bill makes no reference to the existence of any written contract as the basis of the
150 account stated exhibited with it, yet there was a written contract between the complainant and the firm of Catron & Albert, which was in fact the basis of that account.

It is clear from an examination of the contract that it created merely the relationship of principal and agent between the parties. By it, the complainant became the agent of Catron & Albert bound to render them the personal services called for by the contract in consideration of $10.00 per week for certain weeks in each year, and the further sum of 5% of the amount paid by Catron & Albert to each troupe of actors in each play furnished to the principal by the services of the agent; and the consideration for which the agent rendered its services was to be forwarded it by the principal on

Monday of each week from Chattanooga, Tennessee, to Chicago, Ill., where the office of the agent was located.

"Commerce with foreign nations and among the states, strictly considered, consist- in intercourse and traffic, including in these terms, navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." Mobile County vs. Kimball, 102 U. S., 702; 26 Law Ed. 241.

The same court, in a case very much in point here, held that agents engaged in hiring laborers in the state of Georgia to be employed beyond the limits of that state were not engaged in interstate commerce, and while it was admitted arguendo in
151 the opinion in that case that transportation interstate must necessarily take place as the result of the contracts, yet it was held not to follow that the emigrant agent was employed in transportation. William vs. Fears, 179 U. S., 270, Law Ed., Vol. 455, p. 186.

So, it is clear, that under the contract in the present case, and under the proof as it shows the execution of that contract, it was not contemplated that the complainant agent should engage, nor did it in the execution of the contract in fact, engage so far as this record shows in the interstate transportation of the troupes of vaudeville actors. On the contrary, in clause 5, the agent especially stipulates against liability or responsibility for failure on the part of any artist or artists (as the actors are called) to fulfil their contracts, and against any accident or delay which may intervene to prevent their arrival in Chattanooga when scheduled there to appear.

The true question before us it must here be borne in mind is whether the business between the Amusement Company and Catron & Albert whereby the former was merely acting as go-between, middleman or agent involved, or was interstate commerce. True it is that such commerce might or might not so far as this record shows, become an incident or factor in the execution of the contract, which is to say that it might or might not be necessary for the actors employed by the agent to cross the state line in travelling to Chattanooga, but such interstate commerce, if it accrued as a consequence of the contract, would only be incidental to its execution and not a part of it as between the parties to the contract. Such incidental connection of interstate commerce with the business contemplated by the principal and agent does not stamp that business with the character of interstate commerce. Speaking to the
152 exact point, the present Chief-Justice of the Supreme Court of the United States in the next case cited below called attention to this distinction, and to its observance in the authorities cited in that opinion, he said:

"If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the whole sphere of mercantile activity in any way connected with trade between the states and would exclude state

control over many contracts purely domestic in their nature." Hooper vs. California, 155 U. S. 468, Law Ed. 297.

Under the facts of the case before us and the authorities above referred to, we are convinced that the contract and business out of which this suit arises was subject to the laws of Tennessee, and complainant's insistence that it was free from state control because it was interstate commerce, is, we think, unsound.

The only remaining insistence for complainant is that this record does not disclose a doing by the company of business in Tennessee within the meaning of our statutes.

The contract was first signed by complainant in Chicago but this signature did not make it a contract. It became a contract only when signed by Catron & Albert, and their signature was affixed to it in Tennessee at Chattanooga.

The amount the Amusement Co. claims the right to recover from Catron & Albert in this suit is made up of two elements as we have seen, each of which depends on, and directly grows out of, business which, in contemplation of the contract, was to be done in Tennessee. This business was the appearance of actors at the theatre of Catron & Albert in Chattanooga, for the booking and employing of
153 whom the contract stipulated $10.00 per week for certain weeks should be paid to complainant, and out of the salaries of the actors five per cent was to be withheld by Catron & Albert and paid to complainant. It is clear from this record that, for the purpose of enlarging and extending its business in Tennessee, Complainant had agents who came into the state and made contracts with other owners of theatres than Catron & Albert; and it is shown by this record that Albert had much correspondence with owners of theatres looking to the extension of complainant's business. A large part of this correspondence was with persons who were residents of this state, and who were interested in theatres located here. While the complainant appears to have had no person located in this state and resident here which it admits was its agent, yet it cannot be doubted on this record that whenever the nature of its business required the same to be done, it sent an agent to look after its business.

The seventh clause of the Articles of Association of the complainant states its purpose to be "to conduct and operate a general theatrical and amusement business."

This purpose it carried out, as is clearly shown in this record by the establishment of what it called circuits on which were located theatres convenient each to the other, and its scheme contemplated the making of contracts with each of these theatres similar to that of Catron & Albert, and the collection of its revenues arising from booking fees and its percentages on actors' salaries. It was distinctly a middleman levying tribute from the owner of the house where amusement was afforded, and from the actors whose talents were employed.

Its operation- in Tennessee were manifestly employed for the
154 general prosecution of its ordinary business, and clearly within the prohibition of our statutes. It has been too long settled

to need discussion that a foreign corporation guilty of non-compliance with these statutes can have no remedy growing out of its transactions made in violation of them, and this is true even in a case where the illigality is made to appear by proof alone without a pleading pointing it out. Cary Lombard Lumber Co. vs. Thomas, 92 Tenn., 8 Pickle, 587; Also construing and applying these statutes are Harris vs. Water & Light Co., 108 Tenn., 24 Pickle, 245; Louisville Property Co. vs. Nashville, 114 Tenn. 6 Cates, 213; Lumber Co. vs. Moore, 126 Tenn., 18 Cates, 313; Insurance Co. vs. Kennedy, 12 Pickle, 96 Tenn., 714.

Our latest case upon this subject is Lumber Company vs. Moore, supra, in which we held that the foreign corporation there under consideration had not been engaged in doing business in this state within the meaning of our statutes, but that case, we think, is distinguishable from the present case. In that case with respect to statutory restrictions upon foreign corporations doing business within the several states, it was said:

"These prohibitions are leveled against the act of foreign corporations entering the domestic state by their agents or engaging in the general prosecution of their ordinary business therein, and they do not apply therefore to acts not constituting any part of their ordinary business."

In that case upon its facts, we held that the foreign corporation did not maintain its agency in Memphis for the usual and ordinary prosecution of ots business within the state, but that it maintaned such agency as a matter of convenience for the prosecution of its business in other states. The distinction between that and the
155 present case is that it was the ordinary business of the complainant Amusement Company to send troupes of actors from one theatre to another in the State of Tennessee for the purpose of presenting plays to audiences assembled in each separate theatre, and from the revenues derived by means of each performance, the complainant Amusement Company in its turn under the contract sued on derived an income. The revenues it received arose directly from acts done in Tennessee in the several theatres where the troupes of actors appeared or performed. The contract sued on shows as ma-y as fifty-three different items, each of which represents complainant Amusement Company's share of the revenues received from fifty-three separate and distinct performances by troupes of actors which complainant caused to appear in the one theatre of defendants in the City of Chattanooga.

Just how many other theatres in Tennessee were operating under like contracts with the complainant company does not clearly appear in the record, but it is clear that complainant was using each of the troupes of actors for whose performance it seeks to recover in this case as an agency in the carrying on of its regular and ordinary business.

In John Deere Plow Co. vs. Wayland, Am. Eng. An. Cases, vol. 2, p. 307; Cone Export & Commission Co. vs. Poole, 24 L. R. A. 289; Tenn. Collieries Co. vs. Edward J. McKeever, 2 L. R. A. (N. S.),

127; A. Booth & Co. vs. G. M. Weighland, 10 L. R. A. (N. S.) 693, and in the notes upon each of the above cases an extensive collation of the authorities upon the question here involved, and kindred questions, will be found.

We do not think the present case falls within the doctrine announced in many of the authorities which hold that an isolated business act within a state does not amount to the carrying on of business, nor do we think the present case falls within the principle announced in another authorities to the effect that business acts done in a state by a foreign corporation which are merely incidental to its business conducted at its domicile are outside of the prohibition of the statutes similar to ours in purpose.

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On the contrary, we think the present case falls within the general rule that a corporation in doing business within a particular state when it transacts therein some substantial part of its ordinary business continuous in character as distinguished from merely casual or occasional transactions.

A corporation can act only through an agent or agencies, but it does not follow that a foreign corporations can evade our statutes by an insistence that it has no recognized agent in this state if, under the facts of the case, it is clearly apparent that it is by means of agencies organized as a part of its ordinary business, conducting that business continuously and regularly in this state, and deriving therefrom an income.

It may be said that the troupes of actors, by means of whose performances the complai-ant corporation in the conduct of its business in this state planned to derive its income, were not employed or paid by the complainant corporation, but, on the contrary, were employed and paid by the defendant partnership, but nevertheless, each troupe caused by the complainant corporation to appear at the theatre of the defendant partnership was an agency used by the complainant corporation in the conduct of its ordinary business for the purpose of producing for it an income out of the conduct of its ordinary business, and the agency thus used performed the acts from which the income to the complainant corporation resulted in the state of Tennessee.

157

It is therefore apparent that the income wheich the complainant planned to derive from the execution of the contract and for which income it sues to recover in this case, resulted as a sequence of the following acts in the order named, first the consent by complainant to the term of the contract, which consent we must hold was given in Tennessee since it is clear that the contract was consented to by the defendant partnership at Chattanooga in that state; second, the engagement by complianant of the troupes of actors to appear on scheduled dates in the theatre of the defendant partnership. This act was done no doubt, by the complainant in its Chicago office; Third, the actual appearance of the actors pursuant to this engagement in the theatre at Chattanooga, Tennessee; fourth, the collection of admission money from the several audiences by the defendant partnership, and the remittance by it of complainant's share of

the money so collected, as that share was fixed by the terms of the contract.

Thus, it is clear that three of the four business acts from which the income sued for resulted were acts done in Tennessee and done, or to be done there under the terms of the contract, by the complainant through agencies employed by it. We think this brings it clearly within the general rule already announced.

As bearing upon the subject under discussion, and generally sustaining our views thereof, we cite the following additional authorities:

Chattanooga Bldg. Etc. Association vs. Denson, 189 U. S. 408, 47 Law Ed. 870.

Lumberman's Insurance Company vs. Meyer, 197 U. S. 407, 49 Law Ed. 810.

Mutual Life Insurance Company vs. Spratley, 172 U. S. 602, 43 Law Ed. 569.

Diamond Glue Co. vs. U. S. Glue Co., 187 U. S. 611, Law Ed. 331.

International Text Book Co. vs. Pigg, 217 U. S., 91, 54 Law Ed. 678.

158 Without further discussion, we hold that the indebtedness evidenced by the account sued on arose out of business conducted in this state by the complainant Amusement Company without precedent compliance on its part with our statutes already cited, and therefore, that it cannot maintain this suit.

It results that the decree of the Chancellor will be reversed, and the suit dismissed.

BUCHANAN, *Judge.*

159 No. 7.

For Publication.

Williams, J.

Filed November 29, 1913. S. E. Cleage, Clerk, by Jas. T. Joy, D. C.

INTERSTATE AMUSEMENT CO.
v.
W. S. ALBERT et al.

Hamilton.

*Dissenting Opinion.*

I do not conceive that there is presented by this record a case of doing business in this State, under the statute cited, on the part of the Amusement Company. It had no plant, property, office, agent or agency in this State. It was related to the resident firm of

Catron & Albert as contractor to contractee, and to non-resident managers or players in like manner; and was but an intermediary. I fail to see how the respective contractual relations, conceived of singly, or (if that were permissible) in conjunction, can be said to fix upon the company the status assigned it by the majority.

WILLIAMS, *J.*

160 No. 8.

Supreme Court of Tennessee, at Knoxville, September Term, 1913.

MONDAY, November 24, 1913.

Court met pursuant to adjournment present and presiding the Honorable Chief Justice M. M. Neil and the Honorable Associate Justices D. L. Lansden, Grafton Green, Arthur S. Buchanan and Samuel C. Williams.

The minutes of Saturday November 22, were read and signed when the following proceedings were had, to-wit:

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

Reversed and complainant's bill dismissed.

This cause came on to be heard on the transcript of the record from the Chancery Court of Hamilton County, assignments of error, briefs and argument of counsel, and upon consideration of the same the Court is of opinion that there is reversible error in the decree of the Chancellor and for the reasons stated in the opinion of the Court, the assignments of error on behalf of the defendant are sustained and the decree of the Chancellor will be reversed.

It is accordingly ordered, adjudged and decreed by the Court that the decree of the Chancellor be and the same is reversed and the bill of the complainant is dismissed.

The complainant and its sureties on its prosecution bond W. E. Drummond and W. B. Miller will pay all of the cost of the cause for which execution is awarded.

161 No. 9.

Supreme Court of Tennessee, at Knoxville, September Term, 1913.

SATURDAY, November 29, 1913.

Court met pursuant to adjournment present and presiding the Honorable Chief Justice M. M. Neil and the Honorable Associate Justices D. L. Lansden, Grafton Green, Arthur S. Buchanan and Samuel C. Williams.

The minutes of Monday, November 24, were read and signed when the following proceedings were had, to-wit:

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT et al.

*Petition to Rehear Dismissed.*

This cause came on to be further heard on petition of complainant for a rehearing in this cause and upon consideration of same, the Court is pleased to refuse the prayer of said petition, and the same is dismissed at petitioner's cost.

162 No. 10.

Supreme Court of Tennessee, at Knoxville, September Term, 1913.

SATURDAY, November 29, 1913.

Court met pursuant to adjournment present and presiding the Honorable Chief Justice M. M. Neil and the Honorable Associate Justices D. L. Lansden, Grafton Green, Arthur S. Buchanan and Samuel C. Williams.

The minutes of Monday, November 24, were read and signed when the following proceedings were had, to-wit:

INTERSTATE AMUSEMENT COMPANY
vs.
W. S. ALBERT

*Order.*

On the hearing of this cause, complainant drew in question claimed rights under and craved and obtained a construction of the following provisions of the Federal constitution, to-wit, Art. I, Sec. 8, sub-sec. 3, touching regulations of Interstate commerce. Whereupon the court was pleased to construe said provisions and amendments and to hold that the rights asserted and claimed by complainant thereunder are not impaired or infringed by the decree entered herein. On petition to rehear complainant drew in question Art. I Sec. 10, touching laws impairing the obligation of contracts; Articles 5 and 14 of amendments, forbidding the deprivation of property without due process of law, and the enforcement of a law which shall deprive a person of property without due process of law; and Art. 14 of amendments, forbidding a denial of the equal protection of the laws.

The petition to rehear was dismissed.

163 Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court, do hereby certify that the foregoing is a full, true, perfect and complete copy of the transcript

of the record, in the cause Interstate Amusement Company, Versus W. S. Albert, et al., lately pending in said Court, and as the same was certified by the Clerk and Master of the Chancery Court of Hamilton County, Tennessee, and of the following papers in connection therewith:

(1) Statement of Case, Assignments of error and brief in behalf of defendant W. S. Albert;
(2) Reply Brief of Complainant Interstate Amusement Co.;
(3) Second Statement of case, assignments of error and brief in behalf of defendant W. S. Albert, the appellant:
(4) Memorandum Brief for Complainant;
(5) Petition for Complainant;
(6) Opinion of the Supreme Court;
(7) Dissenting Opinion of Judge Williams;
(8) Decree of the Supreme Court;
(9) Order of Supreme Court dismissing petition to rehear;
(10) Order of Supreme Court;

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office, in Knoxville, on this the 19th day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE,
*Clerk of the Supreme Court of Tennessee.*

164 The Supreme Court of the State of Tennessee.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et als.

*Petition for Writ of Error.*

To the Honorable M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee:

The petition of Interstate Amusement Co. a corporation with its situs in Chicago, Ill., sets forth that on or about the 29th day of November, 1913, the Supreme Court of the State of Tennessee made and entered a final order and decree herein in favor of W. S. Albert, Fletch Catron, and the Tennessee Realty & Leasing Co. and against your petitioner, Interstate Amusement Co., in which final order and decree and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of said Interstate Amusement Co., all of which will more in detail appear from the assignment of errors which is filed with and as a part of this petition.

That the said Supreme Court of the State of Tennessee is the highest Court of the said State of Tennessee in which a decision in this suit and this matter could be had.

Wherefore, said Interstate Amusement Co. petitions and prays

that a Writ of Error from the Supreme Court of the United States may issue in this behalf to the Supreme Court of the State of Tennessee, for the correction of errors so complained of; that a transcript of the record proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States; that proper citation issue; and that the bond herewith presented be approved, and that, upon compliance with the terms of the statute in such cases made and provided, that said bond
165 and Writ of Error may operate as a supersedeas. And that the decree aforesaid of said Supreme Court of Tennessee be reversed.

INTERSTATE AMUSEMENT CO.,
(Signed) By W. B. MILLER, *Attorney.*
W. E. DRUMMOND,
GEO. H. WEST,
W. B. MILLER,
*Attorneys for Petitioner.*

The Writ of Error as prayed for in the foregoing petition is hereby alowed, this 26 day of January, 1914. The writ of error to operate as a supersedeas, the bond for that purpose being hereby fixed at the sum of $750.00.

Dated this 26 day of January, A. D. 1914.

(Signed) M. M. NEIL,
*Chief Justice of the Supreme Court of the State of Tennessee.*

Filed in my office this 29 day of January, A. D., 1914.

(Signed) S. E. CLEAGE,
*Clerk of the Supreme Court of the State of Tennessee.*

166 The Supreme Court of the State of Tennessee.

INTERSTATE AMUSEMENT CO.
vs.
W. S. ALBERT et als.

*Bond for Writ of Error and Supersedeas.*

Know all men by these presents, That we, Interstate Amusement Co., as principal, and W. B. Miller, as surety, *is* held and firmly bound unto W. S. Albert, Fletch Catron and Tennessee Realty & Leasing Co. in the penal sum of $750.00 to be paid to the said obligees, their successors, representatives and assigns, to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 26 day of January A. D. 1914.

Whereas, the above named Interstate Amusement Co. hath prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the Supreme Court of the State of Tennessee in the above styled cause.

Now, therefore, the conditions of this obligation are such that if the above named plaintiff in error, Interstate Amusement Co. shall prosecute its writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise, to remain in full force and effect.

INTERSTATE AMUSEMENT CO.,
(Signed) By W. B. MILLER, *Attorney.*
W. B. MILLER.

I hereby approve the foregoing bond and surety, this
167 26 day of January, A. D. 1914.
(Signed) M. M. NEIL,
*Chief Justice of the Supreme Court of Tennessee.*

168 Supreme Court of the State of Tennessee.

INTERSTATE AMUSEMENT CO., Plaintiff in Error,
vs.
W. S. ALBERT et als., Defendants in Error.

The undersigned defendants in error in above styled cause, by their attorneys, do hereby expressly waive the issuance and service of citation, and waive any other or further notice of the filing in this cause of a writ of error and supersedeas from the Supreme Court of the United States to the Supreme Court of Tennessee and bond therefor and the order allowing said petition and approving said bond.

We hereby agree that the case may be treated as if proper citation and notice had been issued and served upon said defendants, as of the date of the filing of said writ of error, in the manner required by law and the rules of the Court.

This January 28, 1914.

COLEMAN & FRIERSON,
*For Def't Catron.*
J. V. WILLIAMS,
*For Def't Albert.*

169 The Supreme Court of the State of Tennessee.

INTERSTATE AMUSEMENT CO., Plaintiff in Error,
vs.
W. S. ALBERT et als., Defendants in Error.

*Assignments of Error on Writ of Error from the Supreme Court of the United States to the Supreme Court of Tennessee.*

Now comes the said plaintiff in error, the Interstate Amusement Co., and in connection with its petition for a Writ of Error, respectfully submits that in the record, proceedings, decisions and final judgment and decree of the Supreme Court of the State of Tennessee, in the above entitled matter, there is manifest error in this, to wit:

(1) The Supreme Court of the State of Tennessee erred in holding that the provisions of Chapter 31 of the Public Acts for the year 1877 of the General Assembly of the State of Tennessee as amended by Chapter 122 of said Acts for the year 1891, and Chapter 81 of said Acts for the year 1895, (being 2545-2561 Shannon's Code of Tennessee) relative to the rights of foreign corporations to transact business in Tennessee on and as applied to the facts of this case, are not violative of and repugnant to Article 1, Section 8, Subsection 3 of the Constitution of the United States touching the regulation of Interstate Commerce.

(2) The Supreme Court of the State of Tennessee erred in holding that the provisions of said Statute (Chapter 31 Acts of 1877 as amended by Chapter 122 of the Acts of 1891, and Chapter 81 of the Acts of 1895, of the General Assembly of the State of Tennessee, Shannon's Code of Tennessee, 3545-2561) are not violative of and repugnant to Articles 5 and 14 of the Amendments to the Con-
170 stitution of the United States forbidding the deprivation of property without due process of law, the denial of equal protection of the laws, and forbidding the abridgement of the privileges and im-unities of citizens of the United States.

(3) The Supreme Court of the State of Tennessee erred in denying any relief to the Plaintiff in Error Interstate Amusement Co., upon the facts of this case, which denial was in contravention of the rights guaranteed to the Plaintiff in Error by Article 1, Section 8, Subsection 3, of the Constitution of the United States, and Article 14 of the Amendment to said Constitution.

(4) The Supreme Court of the State of Tennessee erred in denying, upon the facts found, any relief to the Plaintiff in Error Interstate Amusement Co., which total denial of relief was in contravention of the rights which said Plaintiff in Error claimed and to which it was and is entitled under Article 1, Section 8, Sub-section 3 of the Constitution of the United States, and Sections 5 and 14 of the Amendments to said Constitution.

(5) The Supreme Court of the State of Tennessee erred in holding that "the contract and business out of which this suit arises was sub-

ject to the laws of Tennessee," alone, and not subject to Article 1, Section 8, Sub-section 3, of the Constitution of the United States, over "a complainant's insistence that it was free from state control because it was interstate commerce," and within said Article of the Constitution of the United States.

(6) The Supreme Court of the State of Tennessee erred in holding under the facts presented by the record that the making of the contract and the transaction of the business out of which this suit
171 arose was such a "doing of business" in Tennessee as was exclusively subject to the laws of Tennessee, which holding was in contravention of the rights of the Plaintiff in Error under Article 1, Section 8, Sub-section 3, of the Constitution of the United States, and Article 14 of the Amendments to said Constitution.

(7) The Supreme Court of the State of Tennessee erred in reversing the decree of the Chancery Court of Hamilton County herein, by which reversal there was a denial to P-aintiff in Error of rights to which it was entitled under Article 1, Section 8, Sub-section 3, of the Constitution of the United States, and Article 14 of the Amendments to said Constitution.

(8) Said Supreme Court of Tennessee erred, in that it adjudged Plaintiff in Error was doing business in Tennessee, for this, that there was no evidence whatsoever to support such judgment, and consequently the denial of a recovery to Plaintiff in Error of the amount sued for amounted to a deprivation of property of Plaintiff in Error without due process of law, contrary to Article 14, amending an amendment to Constitution of the United States.

(9) Said Supreme Court of Tennessee denied to Plaintiff in Error the equal protection of the laws, thereby violating Article 14 of amendments to the Constitution of the United States, in that it held the business of Plaintiff in Error as conducted and carried on constituted a "doing of business" in Tennessee, as that term is used in the statutes and decisions of said State, under Chapter 31 Public Acts of 1877 and subsequent amendments of said Act, whereas, the Honorable Supreme Court of Tennessee had held in the case of Lumber Co. vs. Moore, 126 Tenn., 313, with respect to substantially the same facts and transactions, that they did not constitute a "doing of business" in Tennessee.

(Signed) W. E. DRUMMOND,
G. H. WEST,
W. B. MILLER,
*Attorneys for Plaintiff in Error.*

172 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Tennessee before you, or some of you, being the highest court of law or equity of the said State to which a decision could be had in the said suit between the Interstate Amusement Company as plaintiff and

W. S. Albert, Fletch Catron and Tennessee Realty and Leasing Company, as defendants, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege or exemption especially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Interstate Amusement Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you that judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty (30) days from the date
173 hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th. day of January, in the year of our Lord, One Thousand Nine Hundred and Fourteen.

[Seal District Court of the United States, Eastern District of Tennessee.]

HORACE VAN DEVENTER,
*Clerk of the District Court of the United States,*
*Eastern District of Tennessee.*

Allowed by

____ ____,
*Chief Justice Supreme Court of Tennessee.*

174 Office of Clerk of the Supreme Court for the Eastern Division of the State of Tennessee.

I, S. E. Cleage, Clerk of said Court, do hereby certify that on the 29th day of January, 1914, there was filed in my office the petition of Interstate Amusement Company for writ of error, a copy of which is hereinbefore set forth, with endorsement thereon signed by the Honorable M. M. Neil, Chief Justice of the Supreme Court of Tennessee, reading as follows:

POOR

"The Writ of Error as prayed for in the foregoing petition is hereby allowed, this 26 day of January, 1914. The writ of error will operate as a supersedeas, the bond for that purpose being hereby fixed at the sum of $750.00.

Dated this 26 day of January, A. D. 1914.

M. M. NEIL,
*Chief Justice of the Supreme Court of Tennessee.*"

On the same date there was filed in my office the original bond of Interstate Amusement Company with W. B. Miller as surety, in the penalty of Seven hundred and fity dollars ($750.00) and approved by the Hon. M. M. Neil, Chief Justice of the Supreme Court of the State of Tennessee, a copy of which is hereinbefore set forth.

On the same date there was lodged in my office waiver of defendants by their Attorneys Coleman and Frierson and J. V. Williams, waiving the issuance and service of citation and waiving any other or further notice of the filing in this cause of Writ of Error and Supersedeas, as hereinbefore set forth.

On the same date there was lodged in my office assignments of error on behalf of Interstate Amusement Company, a copy of which is hereinbefore set forth.

On the same date there was lodged in my office the original writ of error to the Supreme Court of the United States, as hereinbefore set forth, and signed by the Hon. Horace Van de Venter Clerk of the District Court of the United States, for the Eastern District of Tennessee.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court, at office in Knoxville, Tenn., on this the 30th day of January, 1914.

[Seal of the Supreme Court, Knoxville, Tenn.]

S. E. CLEAGE, *Clerk.*

Endorsed on cover: File No. 24,054. Tennessee Supreme Court. Term No. 361. Interstate Amusement Company, plaintiff in error, vs. W. S. Albert, Fletch Catron, and Tennessee Realty and Leasing Company. Filed February 13th, 1914. File No. 24,054.

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IN THE

# Supreme Court of the United States

*OCTOBER TERM, 1914*

No. [redacted] 69

**INTERSTATE AMUSEMENY COMPANY**
*Plaintiff in Error*

*vs.*

**W. S. ALBERT**
*Defendant in Error*

**ERROR TO THE SUPREME COURT OF TENNESSEE.**

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

W. B. MILLER,
*Attorney for Plaintiff in Error.*

W. E. DRUMMOND,
G. H. WEST,
*Of Counsel.*

SIMS-CORMAN-COOKE, CHATTANOOGA

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# Supreme Court of the United States

OCTOBER TERM, 1914.

No. 361.

INTERSTATE AMUSEMENT COMPANY,
*Plaintiff in Error,*

*vs.*

W. S. ALBERT,
*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF TENNESSEE.

## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

### STATEMENT OF THE CASE.

Plaintiff in error, Interstate Amusement Company, sued in Chancery Court at Chattanooga, Tennessee, (R. 2) to recover of W. S. Albert and Fletch Catron, as partners, a stated account of $1554.00, the correctness of which Albert had certified in writing (R. 4-5). Tennessee Realty and Leasing Company was made a defendant to reach funds held by it belonging to Catron and Albert. It paid the money into court and was discharged from further liability. (R. 61). Catron admitted indebtedness in some amount (R. 5-6) and decree was afterwards rendered against him from which no appeal was taken. The contest here is solely between the Amusement Company and Albert.

Albert originally relied on a demurrer (R. 6) which he subsequently waived, (R. 97, 101) coupled with an answer, (R. 7) in which he set up that plaintiff in error was a foreign corporation which had not complied with the statutes of Tennessee under which such corporations were permitted to transact business and for that reason it could not recover. He admitted the indebtedness sued on, (R. 7) and as a defense plead set off, which contention, however, was found against him by both the Chancery and the Supreme Court of Tennessee. (R. 104).

The Chancery Court rendered decree against Albert for the claim sued on and interest amounting to $1693.86, (R. 62) from which he appealed. In the Supreme Court he assigned as error (1) the overruling of his demurrer, and (2) the rendition of any decree against him. (R. 69). The first assignment was subsequently waived (R. 97, 101). The Supreme Court sustained the second assignment, reversed the Chancery Court, dismissed the bill and charged plaintiff in error with all costs (R. 104-11). 128 Tenn. 417. As shown in the opinion, the Tennesssee Supreme court held defendant in error was *not entitled to any set off*, and the amount sued for was in every respect a valid indebtedness, except for failure of plaintiff in error to comply with Ch. 31, page 44 of the 1877 Acts, General Assembly of Tennessee, and Amendments thereto, which statutes it held applicable.

## FOREIGN CORPORATION REQUIREMENTS.

The court held plaintiff in error had forfeited its right to recover its indebtedness because of its failure to comply

with said Tennessee statute of 1877, as amended by Ch. 122, page 264, Acts 1891; and Ch. 81, page 123, Acts 1895, which, in substance, as to foreign corporations, provide that every such corporation created or organized under or by virtue of any government other than that of the State of Tennessee, for any purpose whatever, desiring to own property or carry on business in said state of any kind or character, shall first "file in the office of the Secretary of State a copy of its charter".

Section 3 of said Act of 1877 as amended provided as a penalty that "it shall be unlawful for any foreign corporation to do business or attempt to do business in this state without first having complied with the provisions of this Act, and the violation of this statute shall subject the offender to a fine of not less than $100.00 nor more than $500.00 in the discretion of the jury trying the case."

It was also provided that "when a corporation complies with the provisions of this Act, said corporation may then sue and be sued in the courts of this state and shall be subject to the jurisdiction of this state as fully as if it was created under the laws of the state of Tennessee." Non-complying corporations were not forbidden to sue in the courts of Tennessee. And they are not exempt from suit in such courts. The sole effect as to non-complying corporations was to declare it unlawful for them to do or attempt to do business in the state. (See Section 2, Ch. 81, 1895 Amendment; *Property Co. vs. Nashville,* 114 Tenn., 219.)

Complying corporations were affected only as to property and acts within the State of Tennessee. *Adams vs. Chat-*

*tanooga,* 128 Tenn., 515; *Simon vs. Railroad,* 236 U. S., 115.

They were allowed to "enjoy the rights and do the things herein specified upon the terms and conditions and in the manner and under the limitations herein declared." One condition was that they should submit to their property being attached in any county of the state where such property was situated in the event they had no agent for service of process in such county. (See Sec. 5, Ch. 12, Acts 1891).

Another was that they must submit to a preferential lien upon all Tennessee assets in favor of creditors resident in Tennessee. (Sec. 5, Ch. 31, Acts 1877; *Blake vs. McClung,* 172 U. S., 239; 176 U. S., 59).

They were required to pay the Secretary of State annually a "sum of money" upon the "capital stock authorized by charter", in this case $30.00. And also to file annually a statement giving "principal office and place of business in the state of creation, and also in the State of Tennessee; the amount of capital stock authorized by charter and the amount of capital stock issued and outstanding"; the name of officers and Board of Directors. (Ch. 434, page 1477, Acts 1907.)

And to pay the Secretary of State $20.00 when presenting to him a copy of charter to be filed under the Act of 1877 and amendments. In addition, as a precedent to filing a copy of the charter, and of doing business in Tennessee, to pay the Secretary of State *"a tax upon its authorized capital stock"* (Ch. 504, Acts 1909) in this case $200.00, the authorized capital stock being $230,000. (R. 57-8).

This Act was "amendatory of the schedule of taxes on foreign corporations coming to this state" (Sec. 3 of Act) and was but a re-enactment of similar statutes. (Acts 1903, Ch. 504; 1889, Ch. 239).

The "tax upon authorized capital stock" as well as the "sum of money" required to be paid annually thereon, was levied upon the presumption that the *authorized* capital stock had been fully issued and paid for and without any regard whatever to the amount of such capital employed in Tennessee, or in other states or countries or in interstate commerce. These several acts form part of a "system" of laws "created by the Legislature of this state with regard to the entry of foreign corporations, their administration and control, beginning with that of 1877, and each later statute has to be considered with reference to the pre-existing body to which it is added and of which it forms a part." *Coke & Coal Co. vs. Steel Co.*, 123 Tenn., 441.

There were other onerous terms, conditions, requirements and limitations imposed by said statutes against foreign corporations not necessary to be here noticed. The foregoing references are quite sufficient to disclose the burdens imposed.

Plaintiff in error owned no property and had no office in Tennessee. It was a Missouri corporation with principal office in St. Louis (R. 52), but domesticated and doing business in Illinois (R. 8) and from its "main office in Chicago" it engaged and booked the actors (R. 12, Int. 4) for theatre owners and operators in a circuit covering the Southeastern states. (R. 14-15).

Plaintiff in error did not comply with the Foreign Corporation Statutes of Tennessee and it contended:

(1) The acts out of which this claim arose did not constitute "doing business" in Tennessee.

(2) If it did do business of any kind in Tennessee same was interstate commerce and could not be materially interfered with or hampered by state regulation, the effect whereof was to deny it a recovery of debt contrary to Art. 1, Sec. 8, sub-Sec. 3, Federal Constitution.

(3) Giving a fair and natural construction to the entire evidence in the light of the Federal Constitution, there was a total absence of support for the decision of the Tennessee Supreme Court, and hence its denial of recovery for the claim sued on amounted to a deprivation of property without due process of law, as guaranteed by the Fourteenth Amendment. (R. 112, 116-17.)

Without questioning that plaintiff in error held a just claim upon which it would otherwise be entitled to recover, the Supreme Court of Tennessee, by a majority opinion, (R. 104) denied to it a recovery solely by virtue of said statutes. A dissenting opinion was filed by Williams, J. (R. 110) as follows:

> "I do not conceive that there is presented by this record a case of doing business in this state under the statute cited on the part of Amusement Company. It had no plant, property, office, agent or agency in this state. It was related to the resident firm of Catron & Albert as contractor to contractee and to non-resident managers or players in like manner; and was

but an intermediary. I fail to see how the respective contractual relations conceived of singly or (if that were permissible) in conjunction, can be said to fix upon the Company the status assigned it by the majority. Williams, J." (R. 110, 128 Tenn., 432.)

A petition to re-hear was filed (R. 101) emphasizing the three-fold contention above of the Amusement Company, and all questions therein presented were ruled against plaintiff in error. (R. 112). Thereupon, it sued out a writ or error from this court (R. 113), which was allowed by the Chief Justice of Tennessee (R. 114) and the following:

## ERRORS ASSIGNED.

### I.

"The Supreme Court of the State of Tennessee erred in holding that the provisions of Chapter 31 of the Public Acts for the year 1877 of the General Assembly of the State of Tennessee as amended by Chapter 122 of said Acts for the year 1891, and Chapter 81 of said Acts for the year 1895, (being 2545-2561 Shannon's Code of Tennessee) relative to the rights of foreign corporations to transact business in Tennessee on and as applied to the facts of this case, are not violative of and repugnant to Article 1, Section 8, Sub-section 3 of the Constitution of the United States touching the regulation of Interstate Commerce.

### II.

The Supreme Court of the State of Tennessee erred in holding that the provisions of said Statute (Chapter 31,

Acts of 1877 as amended by Chapter 122 of the Acts of 1891, and Chapter 81 of the Acts of 1895, of the General Assembly of the State of Tennessee, Shannon's Code of Tennessee, 2545-2561) are not violative of and repugnant to Articles 5 and 14 of the Amendments to the Constitution of the United States forbidding the deprivation of property without due process of law, the denial of equal protection of the laws, and forbidding the abridgement of the privileges and immunities of citizens of the United States.

III.

The Supreme Court of the State of Tennessee erred in denying any relief to the plaintiff in error Interstate Amusement Company, upon the facts of this case, which denial was in contravention of the rights guaranteed to the plaintiff in error by Article 1, Section 8, Sub-section 3, of the Constitution of the United States, and Article 14 of the Amendments to said Constitution.

IV.

The Supreme Court of the State of Tennessee erred in denying, upon the facts found, any relief to the plaintiff in error Interstate Amusement Company, which total denial of relief was in contravention of the rights which said plaintiff in error claimed and to which it was and is entitled under Article 1, Section 8, sub-section 3 of the Constitution of the United States, and Sections 5 and 14 of the Amendments to said Constitution.

V.

The Supreme Court of the State of Tennessee erred in holding that "the contract and business out of which this

suit arises was subject to the laws of Tennessee," alone, and not subject to Article 1, Section 8, Sub-section 3, of the Constitution of the United States, over "complainant's insistence that it was free from state control because it was interstate commerce," and within said Article of the Constitution of the United States.

VI.

The Supreme Court of the State of Tennessee erred in holding under the facts presented by the record that the making of the contract and the transaction of the business out of which this suit arose was such a "doing of business" in Tennessee as was exclusively subject to the laws of Tennessee, which holding was in contravention of the rights of the plaintiff in error under Article 1, Section 8, Sub-section 3, of the Constitution of the United States, and Article 14 of the Amendments to said Constitution.

VII.

The Supreme Court of the State of Tennessee erred in reversing the decree of the Chancery Court of Hamilton County herein, by which reversal there was a denial to plaintiff in error of rights to which it was entitled under Article 1, Section 8, Sub-section 3, of the Constitution of the United States, and Article 14 of the Amendments to said Constitution.

VIII.

Said Supreme Court of Tennessee erred, in that it adjudged plaintiff in error was doing business in Tennessee,

for this, that there was no evidence whatsoever to support such judgment, and consequently the denial of a recovery to plaintiff in error of the amount sued for amounted to a deprivation of property of plaintiff in error without due process of law, contrary to the Fourteenth Amendent to Constitution of the United States.

IX.

Said Supreme Court of Tennessee denied to plaintiff in error the equal protection of the laws, thereby violating Article 14 of amendments to the Constitution of the United States, in that it held the business of plaintiff in error as conducted and carried on constituted a "doing of business" in Tennessee, as that term is used in the statutes and decisions of said state, under Chapter 31 Public Acts of 1877 and subsequent amendments of said Act, whereas, the Honorable Supreme Court of Tennessee had held in the case of Lumber Co. vs. Moore, 126 Tenn., 313, with respect to substantially the same facts and transactions, that they did not constitute a "doing of business" in Tennessee.

THE CONTRACT.

The contract which plaintiff in error executed, and which the majority of the Supreme Court of Tennessee held violative of the statutes, with office notations thereon, was in writing and as follows: (R. 59-60).

"This contract made and entered into this Twenty-fourth day of May, 1909, by and between the Interstate Amusement Company, a member of the Western Vaudeville Managers' Association of Chicago, Illinois, through B. S. Muck-

enfuss, Booking Manager, hereinafter styled Agent, and Catron & Albert, Proprietors and Managers of the Airdome Theatre, of Chattanooga, Tenn., hereinafter styled, Theatre Owner, Witnesseth:

1. The Agent agrees to engage and book the necessary acts for the Theatre Owner for a period of five years, beginning May 17th, 1909. The number of acts each week not to exceed five, and the cost of the said three, four or five acts each week not to exceed an average of Four Hundred and fifty ($450.00) per week.

2. The Booking Fee will be Ten ($10.00) per week, and will only be charged during the period from September 15th to May 15th of each year.

3. The said Agent agrees to bind himself not to supply any other amusement place in Chattanooga during the life of this contract without the written consent of said Theatre Owner.

4. The Theatre Owner binds himself to remit promptly on Monday of each week to the office of said Agent in Chicago, Illinois, a commission of 5% from the salary of act furnished said Theatre Owner by said Agent, and the booking fee above referred to during the period same is payable.

5. It is agreed that said Agent is acting solely in the capacity of Agent of said Theatre Owner, and is not liable or responsible for the failure on the part of any artist or artists booked to fulfill their contracts, nor is said Agent

responsible for any accident or delay that may prevent said artist or artists from arriving in Chattanooga, Tenn., when they are scheduled. It is understood, however, that said Agent will use every precaution to see that artists fulfill their contracts.

6. It is further mutually agreed between the parties hereto that said Theatre Owner may cancel this contract by giving said Agent six (6) weeks' notice in writing of his intention to discontinue booking arrangements entered into with said Agent.

Witness our hands this the 24th day of May A. D., 1909."

INTERSTATE AMUSEMENT COMPANY,
B. S. MUCKENFUSS, *Booking Manager.*
CATRON & ALBERT,
Pr. WILL S. ALBERT, *Mgr.*"

Airdome Theatre, (Will S. Albert)
Chattanooga, Tenn.
Contract in force—5 years.
Start. May 17th, 1909.
Expires " " , 1914.
Book Comm. 5%.
Book Charge $10.00.
Limit $450.00.
Remarks: 6 weeks' notice. (R. 59-60).

## ABSTRACT OF FINDINGS AND FACTS.

Inasmuch as the contract was fully executed and the justice of the demand originally admitted (R. 5) the only

testimony taken was on behalf defendant in error (R. 103). The facts will now be considered in the light most favorable to him. The contract was first signed by the Amusement Company in Chicago, Ill., and then sent to defendant in Chattanooga, Tennessee, by mail (see opinion R. 107) and by him from there remailed to the Company in Chicago. (Deposition Albert, R. 22). Under this contract plaintiff in error, as *agent* of Catron & Albert, obligated itself to *"engage and book"* for five years from May 17th, 1909, the players or actors who should appear and perform at their theatre in Chattanooga. The number of acts so engaged and booked should not exceed five each week, and the salaries of the players engaged and booked were not to exceed in the aggregate $450.00 per week. It was expressly stipulated in clause 5 that the booker (plaintiff in error) should act solely as "agent" of the theatre owners, and it was not to be liable for any failure or delay of the players to fulfill their engagements booked through it, though it agreed to in fact "use every precaution to see that the artists fulfilled *their* contracts." (R. 60).

In consideration of this service of engaging and booking at Chicago the players or artists who were to perform at the playhouse of defendant in error in Chattanooga, he and his partner Catron agreed to "remit to the office of said agent in Chicago each week a booking fee of $10.00, and a commission of 5% from the salary of the act furnished." (R. 60).

As expressed by Albert in his *answer,* the business of the booker was "to *make contracts* for theatrical artists" (R. 8). As expressed in his deposition, plaintiff in error

was "a booking Agent". (R. 16). Or as expressed by another witness, "Agents there in Chicago is about what you would say" (R. 41). As defined in the opinion of the Supreme Court of Tennessee, plaintiff in error "was distinctly a middle man, levying tribute from the owner of the house where amusement was afforded and from the actors whose talents were employed." (R. 107). As also expressed in that opinion, the contract "created merely the relationship of *principal and agent*" between the parties. * * * * By it the complainant became the agent of Catron and Albert, bound to render them the personal services called for by the contract". (R. 105). * * * * "The consideration for which the agent rendered its services was money to be forwarded to it by the principal on Monday of each week from Chattanooga, Tennessee, to Chicago, Ill., where the office of the agent was located". (R. 105-6). The service rendered by the agent to its principal was simply the making of *contracts* for the benefit of such principal with the actors and playwrights in Chicago, by the terms of which the actors or artists were to appear and perform in certain acts at the theatre of the principal in Tennessee.

By the terms of these contracts, or bookings, made at the office of plaintiff in error in Chicago (see Opinion, R. 109) the failure of the actors "to fulfill *their* contracts," (see Opinion, R. 106; contract, R. 60,) did not relieve the theatre owners from payment of the booking fee of $10.00 per week. This because the Company acted "solely as the agent of defendant in error in the making of these contracts with the actors," (R. 60, 106) and its obligation ended when it

made *in Chicago* the contracts with the actors to appear and perform in Chattanooga. (R. 60, 106). In its execution of the contract the booker did nothing more than the contract obligated it to do. (Opinion, R. 106).

In exchange for the service of making contracts with actors and owners of acts, the theatre owners agreed to remit each week to the office of plaintiff in error in Chicago a booking fee of $10.00, and in addition to pay a commission of 5% on the cost of the acts actually thus furnished during each week. (R. 8, 60, 107).

The actors were to be paid by the theatre owners. If the former kept their contracts and appeared in the acts booked the commission of 5% thereby accrued to plaintiff in error, and was to be remitted weekly with the booking fee. The fee, the salaries paid the actors, and commissions computed thereon, were all due and payable regardless of collections made by the theatre owners or the receipts from tickets sold. (R. 41).

From January 5th, 1911, to January 8th, 1912, Catron and Albert did not make the weekly remittances agreed and the aggregate of the weekly remittances thus accumulated and unpaid, less credits deducted, amounted, as certified to by Albert, $1,554.00. (R. 4, 5).

About this time the theatre of Catron & Albert consolidated with a rival concern, and the booking of plays for defendant in error ceased. (R. 7, 21, 36). More than a year after correctness of the account owing had been certified, by defendant in error, this suit was brought for its collection.

There was some evidence tending to show that *after* the contract had been performed, the cause of action had accrued, and the correctness of its account had been certified, (R. 32, 40, 43), but before suit was brought, plaintiff in error sent soliciting agents into the Southeastern States, including Tennessee, to solicit similar contracts with other theatre owners, and the Supreme Court of Tennesse seems to have considered this "doing business" in Tennessee, contrary to statute, and that it justified a denial of recovery for value of services already rendered. In other words, the legal effect given was *retroactive*. (R. 107). The Court does not say the effect was retroactive, but such is the effect given by it to the subsequent solicitation of business by agents of the Amusement Company. No business was solicited pending the contract under which the service in question was rendered. The solicitation was wholly subsequent and entirely disconnected with the instant contract, and after the amount had been certified by Albert. (R. 32, 40, 43). One witness at first *thought* an agent visited Tennessee in January, 1911, (R. 33), but *found* the visit referred to was July 1st, 1912, (R. 34) and corrected himself accordingly. (R. 36). The document from which his recollection was refreshed was dated June 25th, 1912. (R. 39).

The Court found that Albert had corresponded with theatre owners, some of them residents of Tennessee, (R. 17, Q. 31) suggesting it would be to their interest to engage the services of the Amusement Company as booking agent (R. 107). Such expressions were merely words of commendation, voluntarily given, and there is no finding and

no evidence on which to base a finding that Albert was acting in the capacity of an agent. On the contrary, there is a finding in accordance with the contract that the Company was the agent of Albert and Catron in transactions out of which this suit springs. (R. 105). And that Albert's defense of set-off by reason of such correspondence was "not sustained by the proof". The Court said:

> "He also made the defense of set-off, which is not sustained by the proof and will not be further noticed." (R. 104).

This voluntary correspondence by Albert was long after the cause of action herein accrued and the account had been closed (R. 27, 31, 43, 46, 49, 59).

None of the acts aforesaid was related in any wise to this controversy or the contract, upon the validity of which, as expressed by the Tennessee Supreme Court in the first sentence of its opinion (R. 104) "this suit must stand or fall". When this suit was brought all that remained to be done was for Catron and Albert to remit "to the office of said agent in Chicago, Illinois," (R. 60) the money earned more than a year before. The Supreme Court of Tennessee held (Opinion, R. 109-110) such deferred "remittance" from Chattanooga to Chicago by mail was an act "to be done in Tennessee" under the terms of the contract, and that such act, with three others to be shortly noticed, "brings it clearly within the general rule already announced", (R. 110) and made unlawful by the Tennessee statutes.

The remittance consisted of (a) the booking fee; (b) the 5% "from the salary of the act furnished said theatre owner

by said agent" in the manner shown in the contract,—that is, by contracting with the players to go to Chattanooga and in good faith the "use of every precaution to see that artists fulfilled their contracts". (R. 60). The Tennessee Court said:

> "The contract sued on shows as many as fifty-three different items, each of which represents complainant Amusement Company's share of the revenues received from fifty-three separate and distinct performances by troupes of actors which complainant caused to appear in the one theatre of defendants in the city of Chattanooga". (R. 108).

Again it said the fourth character of business unlawfully done in Tennessee was:

> ". . . . . the collection of admission money from the several audiences by the defendant partnership and the remittance by it of complainant's share of the money so collected, as that share was fixed by the terms of the contract". (R. 109-110).

Clearly, the booking office had no "share" of the proceeds. It was not concerned in any wise with the collections from the audiences. It was entitled to its booking fee without regard to the appearance of the artists. If they appeared and performed their contracts the theatre owner was obligated to pay, in addition to the booking fee, 5% of the cost to it of the act thus performed. Its remittance was not conditioned on receipts, gross or net. There is no support for the conclusion or any inference that the booker shared "the revenues received", or that it was concerned with "the collection of admission money from the several audiences",

or that it had any "share of the money so collected". The liability to it was absolute as to the booking fee, regardless of appearance by the artists. If they kept their contracts, however, an additional 5% commission on the price paid the artists likewise became absolute.

The Tennessee Court also held that the signing of the original contract in Chicago did not constitute an execution of it there by plaintiff in error, and that it became a contract "only when signed by Catron and Albert, and their signatures were affixed to it in Tennessee at Chattanooga." (R. 107). The only "agency plaintiff in error then had in Tennessee was the United States mail. The necessity of *delivery* was not mentioned, but in the view of the Court the *consent* of plaintiff in error "was given in Tennessee, since it is clear that the contract was consented to by the defendant partnership in that state." (R. 109). This *presumptive, continuing consent*, originally given in Chicago, was assumed to have followed the proposed contract into Tennessee, and to have constituted an unlawful "doing of business", thus precluding recovery of a debt arising out of such contract. This resulted from indulging the legal presumption that although the signature of the booker was attached in Chicago, it became effective only when the document was delivered by mail in Chattanooga, and there signed and re-deposited in the mail by the theatre owner.

This was held to be the first of three acts done in Tennessee which made the contract void from its inception, and likewise all acts done under it unlawful,—even the subsequent admission by defendant in error that the amount earned was justly owing. (R. 5).

The Court in its final analysis held there were four unlawful acts done in the making and execution of this contract, which prevented a recovery, (R. 109) to-wit:

(1) Consent given to the terms of the contract by plaintiff in error in Tennessee. (R. 109).

(2) "The engagement by complainant" (plaintiff in error) "of troupes of actors to appear on schedule dates in the theatre of defendant partnership". This act was held to have been done in Chicago.

(3) The actual appearance of the actors pursuant to this engagement in the theatre in Chattanooga, Tennessee. (R. 109).

(4) "The collection of admission money from the several audiences by defendant partnership and the remittance by it of complainant's share of the money so collected, as that share was fixed by the terms of the contract". This was held to have been an act of "doing business in Tennessee" by plaintiff in error.

We have seen that plaintiff in error had nothing to do with the operation of the theatre. (R. 60). It was operated by Catron and Albert. (See answer of Albert, R. 8; His evidence, R. 16; R. 37). The partnership paid the salaries of the actors, and paid plaintiff in error an amount equal to 5% of the actors' salaries, in addition to the weekly booking fee of $10.00. (R. 37).

The plaintiff in error had nothing to do with either the price fixed for admissions or the collections therefrom. Its

right to its income was not dependent thereon. If collections from admissions were not sufficient to pay the salaries of the actors and 5% thereof to plaintiff in error, the theatre owner made up the deficiency. As expressed by one witness, he "sometimes didn't keep part of it; sometimes have to add part of it to it". (R. 41).

The commission to plaintiff in error was an absolute and unconditional liability of the theatre owner, based upon or measured by the "salary of act furnished", (see contract, R. 60), and not upon or by the amount collected for theatre tickets. (Opinion, R. 107).

The aggregate salaries of actors was not to exceed an average of $450.00 per week. In weeks when the maximum average salary was paid plaintiff in error was to receive 5% of that amount, or $22.50, plus a booking fee of $10.00, or a total of $32.50. In weeks when aggregate salaries were not so much as $450.00, it was less. It did not vary with the number of theatre goers or the price paid for admission. These moneys were due plaintiff in error regardless of whether the audiences at the theatre were large or small, whether they paid a high price for admission or were admitted free. As expressed by defendant in error in *his answer*, the amount to be paid was based upon "a certain per cent of the *salary of each set furnished*", without reference to the amount collected. (R. 8). As expressed in his evidence, plaintiff in error would get "a commission of 5% on the gross amount of the bill that was furnished weekly". (R. 18, Q. 40). Nothing was in fact collected from the actors.

The theatre owner simply paid, or was obligated to pay, so much to the actors and so much to plaintiff in error. The amount was in part a certain per cent of the actors' salaries. This was merely a method of designation or fixing an agreed sum. That the Supreme Court of Tennessee did not regard this amount as one collected from the actors or any one else *for plaintiff in error* is fully evidenced by the fact that under the well settled rules of decision of that Court the defense successfully interposed in this case must have in that event failed. Since a collector for a non-complying foreign corporation is not protected by the statute from paying over the money collected by him.

> *Insurance Company vs. Kennedy,* 96 Tenn., 716.
> *State vs. O'Brien,* 94 Tenn., 79.

Thus, the "fourth act" of collecting receipts was an act of defendant in error for his own benefit. The act of remitting was an obligation owing by him for service rendered in Chicago under the contract, and in no sense an act done by him for plaintiff in error. It was his performance of his contract.

It results that there were only *three* acts relative to the indebtedness sued on which were held *unlawful* acts done or to be done by the plaintiff in error in Tennessee. They were (1) signing in Chicago and sending by mail into Tennessee the written proposal "on which this suit must stand or fall"; (2) making in Chicago contracts with various actors, by which they were to go to Chattanooga and perform in the theatre of defendant in error; (3) the remittance from Chattanooga to Chicago of the consideration

earned by plaintiff in error in the making of said contracts.

Plaintiff in error contended that under all the circumstances it was not "doing business" in Tennessee in the sense of the Tennessee statute. And to so construe the statute to deprive it of indebtedness admittedly otherwise due it because of said acts was to deny it the liberty of contract; and to deprive it of property without due process of law. And further that whatever of business was done in Tennessee by it was Interstate Commerce.

The Supreme Court of Tennessee held said transactions were not Interstate Commerce, (R. 106) and that the three acts mentioned "from which the income sued for resulted, were acts done in Tennessee or to be done there under the terms of the contract by the complainant through agencies employed by it." (R. 110).

It held these acts brought plaintiff in error "within the general rule" (R. 110) that a "foreign corporation guilty of non-compliance with this statute can have no remedy *growing out of its transactions made in violation of them.*" (R. 108). It therefore held "that the indebtedness evidenced by the admitted account sued on arose out of business conducted in the state by the Amusement Company, without previous compliance on its part with statutes already cited, and therefore that it cannot maintain this suit." (R. 110).

## BRIEF.

The Tennessee statute as amended prohibits only the "doing of business or attempting to do business" by a for-

eign corporation without first filing a copy of its charter, etc., etc. (Acts 1895, Ch. 81, Sec. 2, p. 123). It does not prohibit bringing suit in Tennessee courts on lawful causes of action as does the foreign corporation statute of New York and some of the other states.

*David Lupton & Sons vs. Automobile Club,* 225 U S., 489; 56 Law Ed., 1177.

Nor does it prohibit the acquisition or ownership of property in Tennessee. Its prohibition is leveled against doing or attempting to do business.

*Louisville Property Co. vs. Nashville,* 114 Tenn., 213.

The statute does not affect single or isolated transactions, but only the transaction in Tennessee of the usual and ordinary business of the foreign corporation.

*Lumber Co. vs. Moore,* 126 Tenn., 313.

Foreign corporations failing to comply with the statute are penalized from one to five hundred dollars for "doing business". (Acts 1895, Ch. 81, Sec. 2). Compliance affords to them the same status as domestic corporations, *(Stonega, etc., Co. vs. Southern Steel Co.,* 123 Tenn., 428, 442), but does not give to them a new entity; they are domestic only as to acts done in Tennessee.

*Adams vs. Chattanooga,* 128 Tenn., 505.

Non-complying corporations transacting their "usual and ordinary business" are not only liable to the penalty prescribed, but by decisions of the Supreme Court of Ten-

nessee their corporate contracts made in furtherance of such "usual and ordinary business" are illegal and recovery thereon will be denied.

*Carey-Lombard Co. vs. Thomas*, 92 Tenn., 587.
*B. & L. Association vs. Cannon*, 99 Tenn., 345.
*Gilmer vs. Savings Association*, 103 Tenn., 272.
*Harris vs. Water & Light Co.*, 108 Tenn., 245.

However, non-complying corporations may recover from their agents moneys actually collected by such agents for their principals while unlawfully carrying on business in Tennessee.

*State vs. O'Brien*, 94 Tenn., 79.
*Insurance Co. vs. Kennedy*, 96 Tenn., 711, 716.

They may also recover the purchase price of machinery they ship into the state and place in position by contract, this being regarded a species of interstate commerce and not subject to state regulation.

*Milan Milling Co. vs. Gorten*, 93 Tenn., 593.

* * * * * * * *

On the assignments of error we make the following contentions:

I.

*The Amusement Company was not engaged in doing business in Tennessee. Therefore, the decision complained of is without support in law, and hence operates to deprive*

*the Company of its property without due process of law, and is violative of the Fourteenth Amendment.*

(1) As well observed by Mr. Justice Williams in the dissenting opinion—(R. 110):

> "It had no plant, property, office, agent or agency in this state. It was related to the resident firm of Catron & Albert as contractor to contractee and to non-resident managers or players in like manner; and was but an intermediary."

There is no evidence to support the judgment and no basis for the conclusion that the Company did business in Tennessee as contemplated by the Act. And to deny it recovery without any basis or evidence to support the judgment of denial is to deprive it of property without due process of law.

*Railroad vs. Albers Commission Co.*, 223 U. S., 573.
*Creswell vs. Knights of Pythias*, 225 U. S., 246.
*Wood vs. Chesborough*, 228 U. S., 678.
*Railroad vs. McWhirter*, 229 U. S., 277.
*Washington ex rel vs. Fairchild*, 224 U. S., 510.

(2) On a Writ of Error to a state court in such a case this Court will review the findings of fact by the state court and analyze the facts when necessary to determine whether or not a Federal right, seasonably claimed, has been infringed.

*Washington ex rel vs. Fairchild*, 224 U. S., 510.
*Railroad vs. North Dakota*, 1914 Term, (Adv. Sheets, p. 432.)

*Railway vs. West Virginia,* 1914 Term, (Adv. Sheets, p. 438.)

(3) And while generally if a decision of the State Court can be upheld on an independent ground it will not be disturbed, yet if such ground or conclusion can only be upheld by a denial of due process of law, the State Court will be reversed.

*Stewart vs. Michigan,* 232 U. S., 665.

(4) Where a state statute "creates a new offense and prescribes the penalty, or gives a new right and declares a remedy, the punishment or remedy can be only that which the statute prescribes." *(Wilder Mfg. Co. vs. Corn Products Co.,* 236 U. S., 165; *Lupton Sons Co. vs. Automobile Club,* 225 U. S., 489.) The Tennessee statute places no ban on anything short of "transacting the usual and customary business within the borders of the state".

*Lumber Co. vs. Moore,* 126 Tenn., 321-2.

The Amusement Company did no such business in the state.

(5) The general right to contract relative to business and to purchase or sell labor is protected from prohibitive state legislation by the Fourteenth Amendment.

*Adair vs. United States,* 208 U. S., 173.

Thus plaintiff in error had a right to make the contract involved in this case and to engage actors in Chicago pur-

suant thereto. A judgment based solely upon a statute against foreign corporations doing business in a state is void when applied to such business done beyond the state, because a deprivation of property without due process of law.

*Old Wayne, etc., Association, vs. McDonough,* 204 U. S., 22.
*Simon vs. Railroad,* 236 U. S., 115.

"The rudiments of fair play required by the Fourteenth Amendment" are wanting when a corporation is deprived of its earned compensation for services rendered in a foreign state to a resident of another state simply because the service rendered contemplates and results in individuals going into the domestic state for the transaction of their own business and in furtherance of that of a resident of such domestic state.

*Railway vs. Polt,* 232 U. S., 65.

(6) The highest court of a state is an instrumentality of the state through which the latter may deprive a citizen of his property without due process of law.

*Chicago & C. R. R. Co. vs. City of Chicago,* 166 U. S., 226.
*Abbott vs. Bank of Commerce,* 175 U. S., 409.

II.

*Whatever of business, if any, plaintiff in error did in Tennessee in connection with this contract, or while it was*

*in force, was interstate commerce and not subject to burdens imposed by statutes of Tennessee. To hold otherwise was violative of Art. 1, Sec. 8, Sub-Sec. 3, Federal Constitution.*

(1) Any state statute, the effect of which is to declare interstate commerce unlawful is itself invalid and unenforceable.

*International Text Book Co. vs. Pigg*, 217 U. S., 91.
*International Text Book Co. vs. Lynch*, 218 U. S., 664.
*Buck Stove & Range Co. vs. Vickers*, 226 U. S., 205.
*Heyman vs. Hayes*, 236 U. S., 178.

(2) The contention that a statute as construed and applied by a state court is void as an attempted state regulation of interstate commerce, will, in event of a decision against such contention, support a writ of error from this Court.

*Adams Express Co. vs. Kentucky*, 214 U. S., 218.

(3) Plaintiff in error did not solicit other contracts in Tennessee at the time the one in question was made or during its existence. But if it had done so, as such contracts were to be executed by it in Chicago in ordinary course, the solicitation thereof in Tennessee by traveling salesmen would have been protected as interstate commerce against the burdens imposed by the Tennessee statutes.

*Stewart vs. Michigan*, 232 U. S., 665.
*Crenshaw vs. Arkansas*, 227 U. S., 389.

(4) The transmission of a proposal for an interstate transaction is a part of the interstate transaction *(Dozier vs. Alabama,* 218 U. S., 124; Davis vs. Virginia, 1914 Term Adv. Sheets, 479) and a message of proposal, such as that sent by plaintiff in error from Chicago to Chattanooga,—and which the Tennessee Court held to preclude recovery because a doing of business in Tennessee,—is but a species of interstate commerce not subject to state regulation.

*Western Union Telegraph Co. vs. Milling Co.,* 218 U. S., 406.
*Western Union Telegraph Co. vs. Brown,* 234 U. S., 542.

(5) A state cannot tax a corporation for doing such character of business, yet this Tennessee statute lays a two-fold annual tax on corporations subject thereto, as before shown.

*Pullman Co. vs. Kansas,* 216 U. S., 62.
*Telegraph Co. vs. Kansas,* 216 U. S., 1.
*Railroad vs. Texas,* 210 U. S., 217.
*Railroad vs. O'Connor,* 223 U. S., 280.

Neither can a state tax the property of a foreign corporation located in another state, or its capital stock represented by such property,—but this is precisely what the Tennessee statute does.

*Ludwick vs. Telegraph Co.,* 216 U. S., 146.
*Pullman Co. vs. Kansas,* 216 U. S., 62.

(6) Interstate commerce "includes the transportation of persons and property. There may be, therefore, a move-

ment of persons as well as of property. That is, a person may move or be moved in interstate commerce." Hence, if the Amusement Company had been obligated to present the artists in Tennessee instead of merely contracting with them to go there and then "using every precaution to see that the artists fulfilled *their* contracts", the business by it done would have been interstate commerce.

*Hoke vs. United States*, 227 U. S., 320.

## III.

*The decision complained of denies to plaintiff in error the "equal protection of the laws" of Tennessee, contrary to the Fourteenth Amendment.*

In *Lumber Co. vs. Moore*, 126 Tenn., 313, 321-2, it was ruled that maintaining an agency in Tennessee for the doing of business elsewhere was not a doing of business in Tennessee; likewise, as to the making of occasional purchases as "isolated transactions" in carrying on regular business. But that the statute applied only to "prosecuting its usual and customary business within the border" of the state.

Applying the rule announced in that case to the facts of this leaves the decree complained of without support. Such rules are applicable because the opinion here (R. 108) expressly affirms the ruling in Lumber Co. vs. Moore, *supra*. It follows that the protection afforded by the statutes in question, as construed in the Moore case, was denied plaintiff in error contrary to the Fourteenth Amendment.

## ARGUMENT.

The only act in the entire transaction that was done by plaintiff in error in any part whatsoever in Tennessee was the interstate transmission of a proposal to Catron & Albert by mail. The only agent employed was the United States mail. The proposal to Catron & Albert and the subsequent contracts with actors were all made in Chicago. Plaintiff in error did nothing else,—never agreed to do anything else.

We maintain a statute construed to prohibit use of the United States mails by a foreign corporation, without filing a copy of its charter in each state where such mails are employed and except on condition that such corporation will pay the taxes and subject itself to the burdens imposed by the Tennessee statute; and upon penalty of confiscation of amounts due it for services rendered, is not in harmony with the Constitution of the United States. The protection afforded by the Constitution was seasonably claimed and was resolved against the rights thus asserted. (R. 112.)

In the most extreme view plaintiff in error did but two acts, and its contract contemplated a third to be done by defendant in error, respectively, to-wit, (1) the transmission into Tennessee of the proposed contract; (2) the inducing of artists to leave Chicago to appear at the theatre of Catron & Albert in Chattanooga; (3) the remittance of the consideration for the aforesaid service of plaintiff in error to it from Chattanooga to Chicago.

The first of these was an interstate transmission of a message. The second an inducement to interstate transport

of persons. The third an interstate transmission of property. Each was interstate commerce.

We submit the constitutional rights of plaintiff in error were infringed by the decree of the State Court in the three respects above and it should be reversed.

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W. E. DRUMMOND,
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*Of Counsel.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1914.

No. 361.

| | |
|---|---|
| INTERSTATE AMUSEMENT COMPANY, *Plaintiff in Error,* *vs.* W. S. ALBERT, *Defendant in Error.* | Error to the Supreme Court of Tennessee. |

## REJOINDER OF PLAINTIFF IN ERROR.

*To the Honorable Court:*

Defendant in error insists this controversy presents one of *fact*—and that the findings of fact by the Tennessee Supreme Court are conclusive regardless of evidential support. If we *accept that view,* the first query is as to whether the Amusement Company was engaged in interstate commerce. The Ten-

nessee Supreme Court said the income sued for resulted from "acts done in Tennessee or to be done there, under the terms of a contract by the complainant *through agencies employed by it.*" (R. 110.) Assuming there is an inference of fact to support such finding, does it not follow that the "agencies" were constituents of interstate commerce? Defendant in error insists to the contrary (Brief, p. 18) and inquires "was the contract between plaintiff and defendant one of the nature of commerce between the states, or was it not intrastate in nature?"—citing *Paul vs. Virginia*, 8 Wall, 168, which involved a contract of insurance. It is not the contract alone with which we are concerned, but what was done under it to constitute the "doing of business" by the Amusement Company in Tennessee, as found by the Supreme Court of that state. The reasoning in Paul vs. Virginia, *supra*, has no application. The "contracts" there involved were held "not articles of commerce" in any proper meaning of the word. But here, on the facts as found by the Tennessee court, there was more than a simple contract. There was business "done under the terms of a contract by the complainant through agencies employed by it."

It is conceded that no *booking* was done by the Company in Tennessee. The *booking* was done in Chicago. The Tennessee court so found. *Booking* was the Amusement Company's business—nothing

else. But if we put aside this view and consider that *all* the business contemplated by the contract was being done by the Amusement Company, then what character of business was thus being done?

Witness Muckenfuss says the Company "had men traveling in the South soliciting business for them" (R. 12-13), and acted "as a booking agency for what is known as the Southeastern Circuit, and in Chicago booked the plays and amusements and routed them through Southern territory." (R. 15.) Witness Albert testified it owned or controlled theaters in Texas and Arkansas "and are also booking agents wherever they can secure houses to take their bookings." (R. 16.) He also said, "I refer to the managers of the Southern territory who had previously organized what we call a Southern Advanced Vaudeville Association. I mean the owners and representatives of theaters in the South." (R. 16-17.)

He further said the Company was benefited in that "by enlarging their circuit" they arranged so "they had so many more weeks they could carry the acts." (R. 18.) Muckenfuss wrote Albert "the best acts and best prices can be had in New York, and hundreds of Western acts would write me to New York and go anywhere I sent them and at my figures." (R. 32.) The letter-head of the Company carried "Affiliated

With Western Vaudeville Managers' Association," showing headquarters at Chicago, and also "Proprietors Interstate Circuit of Vaudeville Theaters."

Witness Sperry said, "Well, these amusement circuits generally have headquarters in a large city like Chicago or New York or Cincinnati, and we make a contract with those people to furnish us so many acts per week, and they are supposed to continue to furnish us with shows from that point." (R. 36.) He was asked, "*So really the function of the booking office, or as in this case the Amusement Company, is to send to the various theaters that are on a circuit throughout the country these players and notify the various theaters that the players will appear on a certain schedule from time to time?*" He answered, A. "Yes, I so understand."

Asked whether the booker did "anything more than simply arrange the schedules with the theaters constituting certain circuits, or whether they actually, in addition to making the schedules, see that the playwrights appear on schedule time," he answered, "I think they have *some sort of a guarantee from an act* when the act is booked with them that they will appear where these booking concerns send them." (R. 37.)

Witness Sudekum testified the Company "had a lot of other houses they were booking, and we wanted

to get on the circuit— at least they wanted us to get on the circuit so as to have smaller jumps to keep the railroad fare from being so much from one town to another." (R. 40.)

The Company advertised itself as a member "of W. V. M.'s Association, Booking Agents." (R. 43.) Witness Albert wrote, August, 1912: "Last December the Western Vaudeville Managers' Association and United Booking Offices of America *renewed* their territorial agreement for twenty-five years, and as I understand it the new dividing line runs *from New Orleans to Memphis thence to Chicago.* All territory east of this line belongs to the U. B. O.; all west to the W. V. M. Association * * * either the interstate (W. V. M. Association) or U. B. O. can furnish, etc." (R. 45-46.)

Can there be any doubt that the business contemplated by this contract was interstate commerce?

> "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." *County of Mobile vs. Kimball*, 102 U. S. 691.

In commerce there may be "a movement of persons as well as of property; that is, a person may

move or be moved in interstate commerce. *Hoke vs. United States*, 227 U. S. 308.

## POINT I.

We maintain that if a contract contemplates the doing of interstate business, and such business be actually done under the terms of the contract, then the latter is of itself an instrumentality and a constituent of interstate commerce—and protected accordingly. Addyston Pipe and Steel Co. vs. United States, 175 U. S. 211, 239.

* * * * * * * * *

Defendant in error argues (Brief, p. 25) that the Amusement Company "nowhere undertakes to dispute in the least that it recognized Albert as its agent, who carried on from his office at Chattanooga a large correspondence with theater managers throughout the South, etc." This statement is wholly unsupported by the record. The Supreme Court of Tennessee found to the contrary in that it denied to Albert "the defense of set off, which is not sustained by the proof, and will not be further noticed." (R. 104.) If he was the agent of the Amusement Company and rendered the service he claimed under a contract of agency or other representation of the Company, his defense of set-off would not have been thus denied.

Secondly, as pointed out in original brief (p. 19), the correspondence by Albert was not only *voluntary* but was long after the account sued on had been closed and the contract fully performed. Every letter of Albert appearing in the record was *subsequent* to the termination of the contract of service involved in this suit.

## POINT II.

There is no evidence sustaining the view that Albert was the agent of plaintiff in error—and the Supreme Court of Tennessee in denying to him the defense of set-off found he was *not* such agent, and *not* engaged in the prosecution of the Company's business either before or subsequent to the termination of the service sued for.

## POINT III.

The inference of defendant in error (Brief, pp. 33-34) that the Supreme Court of Tennessee did not pass on the Federal questions here involved is fully met both by the opinion of the Court (R. 104) and also by the decree on the petition to rehear. R. 112.)

## POINT IV.

Defendant in error insists (Brief, p. 24) "the record shows that the ordinary and usual business of the plaintiff corporation was actually carried on

within the state of Tennessee." There is an utter lack of evidence to support the inference that any booking was done in Tennessee. No contracts were made in Tennessee. The actors engaged did appear in Tennessee and perform.

## POINT V.

When the facts found by the Tennessee court are considered, either separately or together, we earnestly submit there is no basis—no evidential support by inference or otherwise—for the conclusion that the Amusement Company was doing business in Tennessee. Consequently, the denial of its right to collect the debt sued for amounts to a taking of its property without due process of law. *Railroad vs. Albers Commission Co.*, 223 U. S. 573; *Creswell vs. Knights of Pythias*, 225 U. S. 246; *Wood vs. Chesborough*, 228 U. S. 678; *Railroad vs. McWhirter*, 229 U. S. 277; *Washington, ex rel vs. Fairchild*, 224 U. S. 510. But if it was "doing business" in Tennessee, such business was in any sense interstate commerce.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1914

INTERSTATE AMUSEMENT COMPANY,
*Plaintiff in Error,*

*vs.*

W. S. ALBERT,
*Defendant in Error.*

No. 361.

## REPLY BRIEF FOR DEFENDANT IN ERROR W. S. ALBERT.

The principal point involved in this case, as the defendant contends, is one of fact.

The court of original jurisdiction, the Chancery Court, made no findings of fact, but simply decreed that the plaintiff in error (hereinafter called plaintiff) was entitled to a judgment against defendant in error Albert (hereinafter called defendant). (R. 62.) The Supreme Court of Tennessee, however, in its opinion in reversing the lower court (R. 104) (128 Tennessee, 417), made findings of fact in detail.

In view of the established holdings of this Court, we respectfully submit that plaintiff is not entitled

to a reversal of the decree of the Supreme Court of Tennessee, for the reason that there can be no claim of the violation of any Federal right, except a claim based upon the contention that the Supreme Court of Tennessee erroneously found the facts.

The proof was undisputed that plaintiff was a foreign corporation, and that it had never domesticated in Tennessee, as required by the Acts of the General Assembly of that State (Ch. 31, Acts 1877, and amendatory acts thereof).

This plaintiff was engaged, as the Supreme Court of Tennessee found as a fact, in the carrying on of its ordinary business in Tennessee, as contemplated by these statutes, and under the definition given by this Court of what constitutes the "doing of business," in interpreting similar statutes (Cooper Mfg. Co. v. Ferguson, 113 U. S., 727, Diamond Glue Co. v. U. S. Glue Co., 187 U. S., 611, Chattanooga National Bldg. & Loan Ass'n v. Denson, 189 U. S., 408,) it is our contention that all assignments of error made by the plaintiff are immaterial, if this court should conclude that the judgment of the State appellate court is supported by the facts.

This Court has established the rule that "the findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

(United States v. U. S. Fidelity Co., 236 U. S., 527.) We admit, however, that under Creswell vs. Knights of Pythias, 225 U. S. 261, "where a Federal right has been denied as the result of a finding of fact, which it is contended there is no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision."

## PLEADINGS AND PROOF.

The plaintiff sued the defendant to collect $1554 (R. 2). The bill stated the situs of plaintiff was Chicago, Illinois (R. 2).

The bill alleged the indebtedness claimed against defendant grew out of a transaction between plaintiff and a co-partnership styled Catron & Albert, which was conducting a vaudeville theatre at Chattanooga; that after defendant had certified to the correctness of the indebtedness sued for, litigation arose between the members composing the firm of Catron & Albert; that "some time later complainant (plaintiff here) sent its representative to Chattanooga to collect its indebtedness, and after his arrival one of complainant's legal representatives had a conference with defendant Albert and his attorney." (R. 3.) After setting forth the fact that there was due defendant from the Tennessee Realty & Leasing Company, a theatrical corporation which operated the Majestic theatre at Chattanooga, a sum

of money in excess of plaintiff's alleged debt, and that it was the desire of plaintiff to have said sum paid from that Company, and that, in fact, an agreement had been made by and between plaintiff and defendant that this be done, it was charged in the bill that by reason of this arrangement plaintiff "acquired a first and prior lien on the funds so held," etc. (R. 3.)

Mr. Catron, of the firm of Catron & Albert, filed a separate answer (R. 6), setting up the fact that he had been discharged as a voluntary bankrupt. Defendant Albert filed an answer (R. 6), denying that he was indebted to plaintiff. The answer set forth that defendant, Albert, had acted as the agent of plaintiff at Chattanooga in procuring other contracts (R. 9-10), and hence for this service plaintiff was morally indebted to defendant in a sum larger than that claimed to be owing by defendant (R. 10).

The Tennessee Realty & Leasing Company was also made a party defendant to plaintiff's bill, and it answered that it held $1554 as a depository and by agreement with defendant Albert, and that "the representative of complainant, along with said Albert, jointly came to this respondent's manager" in relation to plaintiff's alleged indebtedness against said Albert (R. 11).

The plaintiff introduced no proof whatever.

The defendant introduced himself (R. 16); B. S. Muckenfuss (R. 12); H. L. Sperry (R. 33), and Toney Sudekum (R. 39), as witnesses. Defendant offered in evidence a certified copy of the charter of incorporation of plaintiff (R. 51), which showed that it was organized under the laws of Missouri (R. 5), and that the purposes of the corporation, as stated in the charter, were to "conduct and operate a general theatrical business." (R. 53.)

Defendant Albert testified that the firm of Catron & Albert, of which he was a member, entered into a written contract with plaintiff by which plaintiff was to act as the agent in making bookings for the theater of Catron & Albert at Chattanooga (See contract, R. 59.)

Albert testified the first negotiations in relation to this contract were made between himself and an agent of a railway company at Chattanooga, who called to see Albert, bringing with him a letter from B. S. Muckenfuss, plaintiff's manager. This was in April or May, 1909. (R. 16.) Albert testified the contract between plaintiff and said Catron & Albert was executed by plaintiff at Chicago, and then sent to Catron & Albert, at Chattanooga, in duplicate, and by them executed at Chattanooga (R. 16-22).

Albert testified that at various times the officers of plaintiff came to see defendant at Chattanooga,

and asked him to represent plaintiff in the securing of similar contracts for plaintiff with other southern managers of theaters (R. 16). Defendant testified Manager Muckenfuss came to Chattanooga in person and made this request of him, and that some similar requests were made by plaintiff in letters, and this was about May, 1909. (R. 17.) As result of these requests, Albert wrote various letters at Chattanooga to theater managers throughout the South (R. 17). He says he procured, or aided in procurement, of a number of these contracts for plaintiff (R. 18). Albert testified the largest benefit to plaintiff growing out of the contract between plaintiff and Catron & Albert was the enlargement of plaintiff's circuit, and that in this way plaintiff derived a benefit amounting to approximately $35,000 to $50,000 a year. This was because theaters which booked plaintiff's acts increased its circuit, thereby adding to plaintiff's business and profits. (R. 18.)

Albert, at another place in his testimony (R. 21), said that different officials of plaintiff, on various occasions, came to his place of business at Chattanooga, Tenn., for the purpose of getting defendant to help secure for plaintiff other contracts with southern theater managers (R. 21). Albert filed as Exhibit 3 to his deposition (R. 31), a letter from the manager of plaintiff, in which this statement is made: "Every house that was secured by Inter-

state Independent line" (meaning plaintiff) "I secured, and you helped me get several of the houses." (R. 31.)

H. L. Sperry, witness for defendant, testified that he resided at Nashville, Tenn., and was connected with the Crescent Amusement Company at that place, and was president of the Tennessee Realty & Leasing Company, at Chattanooga, which operated the Majestic theater at Chattanoga. Sperry testified a representative of plaintiff, Mr. Chateau, came to Nashville in 1911, and contract was drawn up and executed at Nashville between plaintiff and said Tennessee Realty & Leasing Company (R. 33). He also stated that another contract was executed between plaintiff and the Princess theater at Nashville; that the negotiations for this contract were had at Nashville, Tenn., and same executed about July 21, 1912. (R. 34.) Sperry testified that from what he understood from the treasurer of plaintiff, Mr. Chateau, plaintiff had purchased a lot in Nashville in March, 1911, on which a theater building was to be erected by plaintiff. (R. 34.)

Sperry further testified that Defendant Albert, of Chattanooga, had solicited Sperry to have his theaters at Nashville and Chattanooga make contracts with plaintiff for the bookings of said theaters. (R. 35.)

Toney Sudekum testified that he was connected

with the Crescent Amusement Company, at Nashville, Tenn., and that the above mentioned contract between the Crescent theater and plaintiff was made at Nashville, Tenn., in June, 1912. (R. 39.)

The Court will see this contract was a contingent one, in that it provided that if the Crescent Amusement Company purchased the Princess theater at Nashville, the Crescent was to continue to book vaudeville acts through plaintiff's circuit. (R. 40.)

Sudekum further testified that representatives of plaintiff had been to Nashville on "several different occasions" to get witness' theater to make contract with plaintiff. (R. 41.) He said he afterwards purchased the Princess theater at Nashville and used the bookings of plaintiff. (R. 41.)

Sudekum further testified that another agent representing plaintiff, Mr. Chateau, of Chicago, came to Nashville in regard to making contract with witness for the benefit of plaintiff (R. 42). He further testified that one of plaintiff's agents, a Mr. Rennee, while in Nashville, stated that unless witness purchased the Princess theater and used the Interstate Amusement Company's bookings, plaintiff would itself purchase the Princess theater. (R. 42.)

Defendant Albert filed certain letters, with notations thereon, which he had written to Mr. Sperry,

of Nashville, as samples of other letters he had written to various theatrical men throughout the South, soliciting contracts for plaintiff. (R. 43-50.)

Defendant filed the original contract between Catron & Albert and plaintiff (R. 59). In this contract plaintiff is referred to as the agent, and the firm of Catron & Albert as theater owner.

The following are the conditions of said contract (R. 60):

"1. The Agent agrees to engage and book the necessary acts for the Theater Owner for a period of five years, beginning May 17, 1909. The number of acts each week not to exceed five, and the cost of the said three, four or five acts each week not to exceed an average of four hundred and fifty ($450) dollars per week.

"2. The booking fee will be ten ($10) per week, and will only be charged during the period from September 15 to May 15 of each year.

"3. The said Agent agrees to bind himself not to supply any other amusement place in Chattanooga during the life of this contract without the written consent of said Theater Owner.

"4. The Theater Owner binds himself to remit promptly on Monday of each week to the office of

said Agent in Chicago, Ill., a commission of 5 per cent. from the salary of act furnished said Theater Owner by said Agent, and the booking fee above referred to during the period same is payable.

"5. It is agreed that said Agent is acting solely in the capacity of Agent of said Theater Owner, and is not liable or responsible for the failure on the part of any artist or artists booked to fulfill their contracts, nor is said Agent responsible for any accident or delay that may prevent said artist or artists from arriving in Chattanooga, Tenn., when they are scheduled. It is understood, however, that said Agent will use every precaution to see that artists fulfill their contracts.

"6. It is further mutually agreed between the parties hereto that said Theater Owner may cancel this contract by giving said Agent six (6) weeks' notice in writing of his intention to discontinue booking arrangements entered into with said Agent." (R. 60.)

The chancellor, as mentioned, found no facts, but simply decreed in favor of the plaintiff against the defendant Albert in the sum of $1554 and interest at the legal rate of 6 per cent., from February 14, 1912 (R. 62), and upon an appeal to the Supreme Court of Tennessee, that Court, in a written opinion, reversed the decree of the chancellor (R. 104), and found the facts as heretofore set forth.

## SUMMARY OF FACTS.

Save and except the fact that plaintiff was shown to be a Missouri corporation, having its situs at Chicago, Ill., and the testimony of the former manager of the plaintiff, B. S. Muckenfuss, that the bookings by the plaintiff were "done from the main office in Chicago," there is no testimony in the record that the plaintiff corporation ever performed any act of business except in the states of Illinois and Tennessee.

While plaintiff had no resident manager in Tennessee, as was disclosed by Mr. Muckenfuss (R. 12), yet, as stated by him, plaintiff "had men traveling in the South, soliciting business for them, and naturally Tennessee was visited in the itinerary of the South." (R. 12.)

The uncontradicted testimony, to the effect that plaintiff was engaged in carrying on its ordinary business in Tennessee, is the following:

(a) The written contract between plaintiff and Catron & Albert was delivered to and executed by Catron & Albert at Chattanooga, the place of performance (R. 16). (b) The plaintiff, by the terms thereof, agred to, and did, furnish numerous theatrical performers who appeared before the public in defendant's theatre at Chattanooga. (R. 60.) The consideration moving from Catron & Albert to plain-

tiff was a sum not to exceed $450 per week, and in addition a commission of 5 per cent. from the salary of the acts furnished, both of said items being collected by Catron & Albert at Chattanooga, in the operation of their theater, as the contractees of plaintiff, and in addition plaintiff agreed in the contract to bind itself not to supply any other amusement house at Chattanooga "during the life of this contract, without the written consent of said Theater Owner." (R. 60.) (c) This contract was to be in force for a period of five years, beginning May 17, 1909, and the plaintiff stipulated that it would "use every precaution to see that artists fulfill their contracts." (R. 60.) (d) The very first negotiation leading up to this contract was made by a friend of the officers of plaintiff who was connected with a railroad company at Chattanooga, and who, with a letter from an officer of plaintiff, first discussed the contract with Defendant Albert at Chattanooga (R. 16.) (e) According to witnesses Sperry and Sudekum, plaintiff made other contracts of a like nature at Nashville, Tenn., by and through agents and representatives of plaintiff, who went to Nashville and carried on the negotiations. (R. 33-39.) (f) Defendant Albert, who resided and had his place of business at Chattanooga, acted as the agent of plaintiff, at the request of its officers, by writing and sending out from Chattanooga letters to theatre owners throughout the South, to secure similar contracts

for plaintiff. (R. 17.) (g) There was some testimony in the record that plaintiff was the owner of certain real estate at Nashville, Tenn., upon which it expected to erect a theater building. (R. 34.) (h) Plaintiff, through its representative, while at Nashville, secured a contract with a Nashville theatre, upon the threat that if such contract was not executed, plaintiff would purchase the Princess theater at Nashville. (R. 42.)

By clause 1 of the contract (R. 60), plaintiff agreed to book certain contracts for the defendant's theatre at Chattanooga. These bookings were to be made for a period of five years, and as contemplated, of course, it provided for the appearance of a different set of actors at Chattanooga for performances running up into the hundreds. (R. 60.) The contract shows that plaintiff was to receive a fee and commission for each and every booking. Plaintiff stipulated that it was to "use" every precaution to see that artists fulfilled their contracts (R. 60); and it is left to conjecture as to whether or not plaintiff would exert this influence from its Chicago office, or whether it would exert its influence from some point in Tennessee.

There is not a syllable of evidence, nor even an intimation in the record, that these actors and actresses, or a single one of them resided outside of Tennessee, or that they were to be sent across the

state line into Tennessee, where they performed at the theatre mentioned. There is not a syllable of evidence in the record showing that the vast number of theatre contracts made by Muckenfuss, and which he admitted was done with the help of Defendant Albert (R. 31) were procured by Muckenfuss while he was in Tennessee or elsewhere, and since he admitted that Albert had helped secure a number of these contracts, the presumption must be, in the absence of all testimony, that the efforts made in Tennessee were at least partially the cause of procuring some of the contracts.

## BRIEF AND ARGUMENT.

The first act of the General Assembly of Tennessee, providing for the domestication of foreign corporations, is Chapter 31 of the Acts of 1877 . The terms of this act apply only to foreign corporations organized for mining and manufacturing purposes. In the second section of this act it is provided that such corporations desiring to carry on business in Tennessee should first file in the office of the Secretary of State a copy of their charters, and also cause an abstract of the charters to be registered in the office of the register in each county of the state in which it is proposed to carry on business or to acquire land.

The Supreme Court of Tennessee has held that a

foreign corporation which domesticates in Tennessee does not have to register its charter in each county where it does business, but only with the Secretary of State, as provided in Acts of 1895, Chapter 81, Section 1. (See opinion Chancery Court of Appeals of Tennessee in U. S. Savings & Loan Co. v. Miller, 47 Southwestern Reporter, 17, which was affirmed orally by the Supreme Court of Tennessee December 18, 1897.)

The next act touching the question is Chapter 122 of the Acts of 1891. This act amended the Act of 1877 so as to apply to all foreign corporations which might desire to carry on business or own property in Tennessee; by section 2 of said act it is provided that every foreign corporation created or organized under the laws of any other government or state for any purpose whatever, desiring to own property or "carry on business in this state, of any kind or character, shall first file in the office of the Secretary of the State a copy of its charter," etc., and by section 3 of this act it is provided that it is "unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this state without having first complied with the provisions of this act," and it is provided in another section that a violation of these provisions shall subject the offender to a fine of not less than $100 and not more than $500.

The next and final act on the subject is Chapter 81 of the Acts of 1895. This is an amendatory act of the Act of 1891, above referred to, and provides for the authentication of copies of charters to be filed with the Secretary of State. This repealed that part of the Act of 1877 which required copies of charters of foreign corporations to be registered in each county in Tennessee where such corporation did business. (47 S. W., 17.)

The body of this act does not otherwise change the Act of 1891 in so far as the point here involved is concerned.

The peculiar wording of the Statute of 1895, as to the owning of property on the part of foreign corporations, as construed by the Supreme Court of Tennessee, in the case of *Louisville Property Co. v. Nashville*, 6 Cates, 213, shows that such foreign corporations may own property in Tennessee without registering their charters, and to this effect the amendatory statute of 1895 changed the provisions embodied in the statute of 1891.

The effect of the statute of 1891 was to provide that it "is unlawful for any foreign corporation to do business or to attempt to do business in this state without first having complied with the provisions of this act"; and the first point for decision, therefore,

is whether or not this record shows that plaintiff had been engaged in doing business in Tennessee, it being admitted that it is a foreign corporation, and that it had never attempted to comply with these statutes by registering its charter.

It was held by the Supreme Court of Tennessee, in the case of *Cary-Lombard Lumber Co. v. Thomas*, 92 Tenn., 587-597, that every contract made in Tennessee on the part of a foreign corporation which had not been domesticated, was illegal.

The same Court, in the recent case of *Lumber Co. v. Moore*, 126 Tenn., 313, held that before a foreign corporation is amenable to these statutes it must be shown that it has been engaged in the carrying on of the usual and customary business of such corporation within the borders of Tennessee, and that merely having an agent and maintaining an office in Tennessee, where the usual and customary business of such corporation is carried on in other states, does not make it necessary for such corporation to register its charter. In other words, a foreign corporation can have both an office and agent in Tennessee, and yet, if it does not carry on its usual and ordinary business in the state, it does not have to be domesticated in order to enjoy corporate benefits in Tennessee.

So, it seems the inverse of this proposition is true;

namely, that such foreign corporation is required to domesticate itself in Tennessee, where it carries on its usual and ordinary business in Tennessee, and this regardless of where it maintains its office.

The test, therefore, as defined in the case of Lumber Co. vs. Moore, *supra*, is whether or not the plaintiff corporation had been carrying on its usual and ordinary business in Tennessee.

In the light of what it takes to constitute commerce between the states was the contract between the plaintiff and defendant one of the nature of commerce between the states, or was it of an intra-state nature?

Mr. Judson, in his text book on Interstate Commerce, 2d Ed., Sec. 8, page 15, in defining commerce, says:

* * * "It does not include the contractual relations between citizens of different states which are incidental or even in one sense essential to interstate commercial intercourse;" and further, at the same place, "the business of a manufacturing company, although the manufactured product is sold by the company in other states and in foreign countries, is not interstate commerce. Commerce succeeds manufacture, and is not a part of it, and the relation of the manufacturer, in such a case, to interstate and foreign commerce is incidental and indirect, and

the business is therefore subject only to state control."

This Court, in *Paul v. Virginia*, 8 Wall., 168-183, said:

> "These contracts (insurance contracts) are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something of existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

We respectfully submit that the facts in the instant case show, in accordance with the authorities, that the plaintiff was engaged in carrying on its

usual and ordinary business in Tennessee, in violation of the statutes named.

Diamond Glue Co. v. U. S. Glue Co., 187 U. S., 611.

Chattanooga National Building and Loan Association v. Denson, 189 U. S., 408.

Elliott v. Parlin & Orendorff Co., 71 Kan., 675.

Farrior v. New England, Etc., Co., 38 Ala., 275.

"Business" is said to be a word of large significance, and to denote the employment or occupation in which a person is engaged to procure a living. (Goddard v. Chafes, 2 Allen, 395; Martin v. State, 59 Ala., 36.) Under a statute that any person who shall do any manner of labor, business, etc., shall be punished, etc., the loaning of money and taking a note therefor, was held to be business within the meaning of such statute. (Trowert v. Decker, 51 Wis., 46.) In Towle v. Larrabee, 26 Me., 466, it was held that a promissory note made on Sunday for the price of a horse bought on that day was void as being in contravention of the statute prohibiting trade and business. In Lovejoy v. Whipple, 18 Vt., 379, the taking of a promissory note executed upon Sunday in consummation of a contract previously made, was considered business. "It thus seems," as said by Thurman, J., "to be the common expres-

sion of the courts that the making of a contract is business within the meaning of these acts." (Bloom v. Richards, 2 Ohio St., 388.) It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal or void, as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawful, that vitiates the transaction and renders it void. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business which, being prohibited on that particular day, is void.

The opinion in Diamond Glue Company v. U. S. Glue Co., 187 U. S., 611, upon the point of what constitutes the doing of business, is instructive:

> "According to the undisputed testimony of the plaintiff's vice-president who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with a view to the carrying on of business in that state by the plaintiff, the law of Wisconsin must be applied. London Assurance v. Companhia De Barriero, 167 U. S., 149; Graves v. Johnson, 156 Mass., 211. There is no controversy on this point. But it is said that the contract did not contemplate the carrying on of business by the

plaintiff in Wisconsin, that at most it is ambiguous, and that practically it was construed in accordance with the plaintiff's contention. The declaration is on the contract, and by that the plaintiff must stand or fall. We see no ambiguity in its terms. The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain. It called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter was forbidden by the laws of the state. See Mutual Life Ins. Co. v. Spratley, 172 U. S., 602, 611."

The opinion in Chattanooga National Building & Loan Company v. Denson, 189 U. S., 408, involved an Alabama contract. The corporation in that case was organized in Tennessee, and had its chief office in Chattanooga, in that state. It was engaged in carrying on a building and loan association. The defendant Denson resided at Gadsden, in the state of Alabama, and subscribed for stock in the corporation. The contract, which was made in Alabama provided that Denson was to execute a mortgage on certain real estate in Alabama to secure a loan to be evidenced by a note. Denson executed applica-

tion for loan in Alabama, which was forwarded to Chattanooga, and there accepted by the board of directors of the association. The mortgage and note were prepared at Chattanooga and sent with draft to Denson's home in Alabama, and when he executed the mortgage and the note in Alabama and delivered them over to the agent of the association in Alabama, a check on a Chattanooga bank was delivered to Denson.

Upon these facts this Court held that this was the doing of business in the state of Alabama on the part of the association.

In the case of Elliott v. Parlin & Orendorff, *supra*, the Supreme Court of Kansas said:

> "Paraphrasing the language of Mr. Justice Peckham, in the case of Lumbermen's Ins. Co. v. Meyer, 197 U. S., 407, 25 Sup. Ct., 473, 49 L. Ed., 810, we think it would be somewhat difficult for the plaintiff to describe what it was doing in Kansas if it was not doing business therein, when sending its agents into the state to perform the various acts of adjustment provided for by its contracts and made necessary to carry them out."

Plaintiff contends, however, that the above named statutes of Tennessee are in violation of the rights and privileges granted by the commerce clause of the Constitution.

Our reply to this is, that under the above authorities, and under many other authorities announced by this Court which might be cited, such state laws are constitutional, and do not regulate nor in any wise hamper commerce between the states.

The rule laid down by this Court in the case of *International Text Book Company v. Pigg*, 217 U. S., 79, whether a given transaction is interstate commerce, is that importation is the indispensable element. Measured by that test, there is not anything in this record which shows that there was any importion between the parties and the states in which they were located, except the mere fact that the plaintiff is shown to be a Missouri corporation, having its chief office at Chicago, Ill., and that it makes its bookings from that point. The element of importation does not enter into the matter in any other way. This Court, we respectfully submit, is bound to the conclusion arrived at by the Appellate Court of Tennessee, that the record shows that the ordinary and usual business of the plaintiff corporation was actually carried on within the state of Tennessee. If this is not true, why did not the plaintiff introduce proof to show otherwise? If the plaintiff actually imported the actors and actresses mentioned in its contract with the defendant and other Tennessee contractees, across the state line into Tennessee, it would have been very easy for the plaintiff to have shown this.

It will be seen that the plaintiff nowhere undertakes to dispute in the least that it recognized Albert as its agent, who carried on from his office at Chattanooga a large correspondence with theatre managers throughout the South, to secure contracts for the plaintiff; that the plaintiff also sent many of its agents and representatives into Tennessee, who not only solicited the various contracts, but actually procured contracts of the nature made between plaintiff and defendant's firm; and, of course, no denial was or could be made that the actors and actresses booked or furnished by plaintiff performed in Tennessee, in order for plaintiff to receive the compensation mentioned in the contract.

Statutes of the nature of the Tennessee statutes above quoted are not in conflict with any federal right. This Court, in the case of Paul v. Virginia, *supra*, announced that the business of insurance was not interstate commerce, and that "they (the states) may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."

This Court, in reaffirming the doctrine announced in Paul v. Virginia, *supra*, held in the case of *Hooper v. California*, 155 U. S., 648, that the business of

marine insurance was not interstate commerce, and in this latter case it affirmed the case of *Nathan v. Louisiana*, 8 How., 73, to the effect that a broker dealing in foreign bills of exchange is not engaged in interstate commerce, but in supplying the instrumentalities of commerce, and that, therefore, a state tax upon money and exchange brokers is not void for repugnance to the constitutional power of congress to regulate commerce, and is valid notwithstanding the fact that foreign bills of exchange are instrumentalities of commerce.

Counsel for plaintiff urges in his brief that the statutes of Tennessee are in conflict with the rights given by the Constitution, because of certain requirements in the statutes as to fees which must be paid by foreign corporations when they are domesticated in Tennessee. No claim is made, however, that foreign corporations are discriminated against as compared to local corporations in Tennessee.

This Court, in the case of Baltic Mine Company v. Massachusetts, 231 U. S., 68-88, said:

"Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

The position of learned counsel for plaintiff, on the proposition that the Tennessee statutes have a tendency to hamper comemrce between the states, is, to say the least of it, rather strange, in view of the fact that the plaintiff contends that it never carried on any local business in Tennessee; that its business was altogether of an interstate nature, and, therefore, that it was and is not amenable to the Tennessee statutes in regard to domestication.

Adversary counsel, in his brief, page 6, in undertaking to name the alleged onerous burdens fixed upon plaintiff by these statutes, says that "the condition was that they should submit to their property being attached in any county of the state where such property was situated, in the event they had no agent for service of process in such county." (See Sec. 5, Chapter 122, Acts of 1891.) This, we submit, is incorrect, as a reading of this section under question will show. It is as follows:

> "*Be it further enacted*, That when such corporation has no agent in this state upon whom process may be served, by any person bringing a suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment, he, his agent or attorney, need only make oath of the justness of his claim, that the defendant

> is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

This section was construed by the Supreme Court of Tennessee in *Coke and Coal Co. v. Steel Co.*, 123 Tenn., 428, directly opposite to the point made by adversary counsel.

The opinion in that case involved the foreign corporation laws of Tennessee, and especially the attachment statute with respect to property of foreign corporations who had domesticated in Tennessee.

The opinion called attention to the third section of Chapter 31, Acts of 1877, that after such foreign corporations had been domesticated in Tennessee, they "shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein, in the mode and manner that is, or may be, by law directed in the case of corporations created or organized under the laws of this state." (123 Tenn., 436.)

The opinion further called attention to the amendatory act, Section 4, Chapter 122, Acts of 1891, that "when a corporation complies with the provisions of this act, it shall then be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this state, and is subject to the jurisdiction of the courts of the state, just as

though it were created under the laws of the state." (123 Tenn., 437.)

The exact point now made by adversary counsel was decided against his contention in a very exhaustive opinion in that case, the effect of which was that a foreign corporation which had domesticated in Tennessee could be served with process, and therefore its property could not be attached as if it were a non-resident and as provided in the above section of Shannon's Code of Tennessee.

Instead, therefore, of this part of the statute being a restriction upon the business of a foreign corporation in Tennessee, provided it registers its charter, it has been construed as a protection to such corporation and its property rights, and it is made to enjoy the same benefits as if it had been organized in Tennessee.

It is said by plaintiff that there was a burden in the Act of 1877 in that such foreign corporation "must submit to a preferential lien upon all assets in favor of creditors, resident in Tennessee." (Sec. 5, Chapter 31, Acts 1877.)

This section of the statute in question was construed by the Supreme Court of Tennessee to the effect that Tennessee creditors did have a preferential lien over creditors of other states; subsequently, however, the case deciding that point was brought

to this Court on writ of error, and the holding of the Supreme Court of Tennessee was reversed, and the legislation in question was declared void because in conflict with the federal Constitution. (Blake v. McClung, 172 U. S., 239.)

When the case went back to the Supreme Court of Tennessee there was an alleged ambiguity in the decision of this court, and the Supreme Court of Tennessee, in construing the opinion and mandate of this Court, again upheld this act (McClung v. Embreeville, Etc., Co., 103 Tenn., 339), and the case was again brought to this Court (Blake v. McClung, 176 U. S., 59), and in this latter opinion this Court made plain its decision in the first case by holding (1) that such attempted preferential lien in favor of Tennessee creditors was in violation of rights secured by the federal Constitution; (2) that the foreign corporation in that case which attacked the constitutionality of this legislation "was not a citizen of the United States within the meaning of the second section of the fourth article of the Constitution, and although a 'person' within the meaning of the Fourteenth Amendment, that company was not deprived of its property without the due process of law guaranteed by that amendment, and not being within the jurisdiction of Tennessee, it could not invoke the protection of the clause forbidding the denial by a state of the equal protection of the laws to persons within its jurisdiction." (176 U. S., 65.)

The next attack made is that foreign corporations are, to quote the language of adversary counsel, "required to pay the Secretary of State annually a sum of money upon the capital stock authorized by the charter, in this case $30, and also to file annually a statement giving principal office and place of business in the state, the amount of capital stock authorized by the charter and the amount of the capital stock issued, and outstanding, the names of the officers and board of directors;" (Chap. 434, Acts of 1907); however, counsel overlooked stating that this statute does not apply alone to foreign corporations, but applies to domestic corporations organized under the laws of Tennessee as well.

The first part of the act, after the enacting clause, is in these words:

"That each and every corporation heretofore or hereafter chartered by the state of Tennessee, or organized under the laws, and each and every foreign corporation qualified to do and transact its business in the state, in compliance with its laws requiring foreign corporations to file its charter with the Secretary of State," shall on a date named file with the Secretary of State certain information as to its name, etc., and if a foreign corporation, the principal office and place of business, amount of capital stock, etc., of such foreign corporation.

An examination of this act will show that the fees provided against foreign corporations are identically the same fees as provided against a local corporation organized under the laws of the state.

The other attack made by counsel for plaintiff against Chapter 504 of the Acts of 1909 is that it taxes foreign corporations $20 when they register their charter in Tennessee, in order to do business in the state; and also levies a privilege tax, in this case $200.

The $20 is evidently to cover service of registering the charter in the office of the Secretary of State. The other tax, that of $200, is a privilege, and is so denominated in the act.

This statute is not in conflict with the commerce clause of the Constitution, for the reason that the privilege assessed is manifestly for the doing of business in Tennessee; and this Court has held that a privilege tax on the business of a corporation done within the state is not a tax upon interstate commerce, although the company is also engaged in business between the states. (Express Co. v. Seibert, 142 U. S., 339; Osborne v. Florida, 164 U. S., 650.)

The point which the plaintiff now makes, to the effect that these statutes are in conflict with federal rights and privileges, seems to be made alone because the appellate court of Tennessee held that it was en-

gaged in carrying on its usual and ordinary business in Tennessee, and that it could not recover upon the contract sued on. The attack made is evidently not made because of the hardship forced upon the plaintiff to pay this small fee provided in the statutes, but to clear the way for a right of recovery in this case.

This Court will notice that the fees provided by the Tennessee statutes are usual; they certainly cannot be said to restrict commerce between the states.

It is our contention, however, that this attack upon the statutes of Tennessee cannot be made by the plaintiff, because no such point was made by the plaintiff in either of the lower courts; and the specific point was not made in the assignment of errors for a writ of error.

It was held in the case of *Cleveland & Pittsburgh Railroad vs. City of Cleveland*, 235 U. S., 50, that it is "well settled that the contention made and passed upon in the state court cannot be enlarged upon by assignments of error made to bring the case to this court."

The plaintiff, in neither its brief in the state court (R. 97), petition to rehear (R. 101), nor assignment of errors for writ of error (R. 116), made any specific question that these statutes of Tennessee, in so far as the tax phase was concerned, hampered or interfered with interstate commerce. The plaintiff

simply asserted that the decision of the Supreme Court of Tennessee denied to the plaintiff the rights and privileges given to it by the federal Constitution, and the laws regulating interstate commerce (the same being named), but the plaintiff nowhere assigned as a reason for this denial of right and privilege that the Tennessee statutes, because of the fees fixed, were a limitation upon interstate commerce.

The plaintiff now challenges these statutes for this alone.

Among the rules announced by and in force in the supreme court of Tennessee, is one requiring that the appellant shall file assignments of error, stating "the precise point raised by the pleading" (126 Tenn., 721), and the rules regulating petitions for rehearing, provide that "the point or points on which an argument is desired will be indicated." (126 Tenn., 730.)

It is also well established in Tennessee that all points relied upon for reversal in an appellate court must have been made in the lower court and errors assigned to the same, and if this is not done the appellate court will not pass upon such points. (Loveman vs. Bayless, 128 Tenn., 318.)

The appellate court of Tennessee, therefore, which passed upon this case, did not have an opportunity

to pass upon the point now specifically made by counsel for plaintiff for the first time, that is, that these foreign corporation statutes are in conflict with Federal rights because of the alleged tax burdens named.

In the Court below, the plaintiff contended generally these foreign corporation laws were in conflict with certain named Federal rights and privileges; but no direct point was made that these statutes were void because of the onerous burdens fixed therein by assessing the fees and the tax named.

Do any of the assignment of errors for writ of error comply with Rule 35 of this Court, which requires plaintiffs in error, in assigning errors, to "set out separately and particularly each error asserted and intended to be urged."

An assignment of errors must specifically point out the error complained of.

Michaels vs. Post, 21 Wall, 389.

It seems to us the Federal questions raised by the plaintiff are contingent upon whether or not this court holds that the transaction out of which the claim in controversy grew, was a part of commerce between the states.

If the court should conclude that it was not a part of interstate commerce, then, in our opinion, the

other questions raised by the plaintiff are not worthy of notice, for the reason that it must be conceded that a state may restrict the right of foreign corporations, not only to sue in its courts (Bank of Augusta v. Earle, 13 Pet. 519, 589-591, 10 L. ed. 274, 308, 309; Anglo-American Provision Co. v. Davis Provision Co. 191 U. S. 373, 48 L. ed. 225, 24 Sup. Ct. Rep. 92), but that in addition a state may restrict the right of such corporations to engage in business within its limits (Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Rep. 207).

We concede for the defendant that if the transaction out of which this claim arose was purely of an interstate nature, then it would be the province of this Court to examine the other Federal questions raised by the plaintiff. We feel very sure, however, that this Court will follow the opinion of the appellate court of Tennessee, in holding that on the facts as found by that court, these transactions were carried on in Tennessee as a part of the plaintiff's ordinary business; that in doing so the plaintiff subjected itself to the statutes of Tennessee regulating the registration of charters of foreign corporations, before going to that State and carrying on business, and that such transactions were not in any wise a part of commerce between the states.

The Court will see from an examination of the

Tennessee statutes that there are no restrictions at all placed upon foreign corporations which engage in interstate commerce; if there were, the plaintiff would have a substantial reason for reversal here.

Finally, it is the contention of the defendant that the rule announced by Mr. Chief Justice Fuller, in the case of *Williams v. Fears*, 179 U. S., 278, is controlling.

That was a case where the statutes of Georgia levied a privilege tax "upon each emigrant, agent or employer or employee of such agents, doing business in this State, the sum of five hundred dollars for each county in which such business is conducted." (Paragraph 10 Gen'l tax Act of Georgia, 1898).

In that case Williams acted in Georgia as an agent in employing persons who were to be sent out of the state to perform the work for which they had been hired. This Court held that such a tax was legal, and in pointing out the reason for the same, the Chief Justice said:

> "Mr. Justice White there (Hooper vs. California, 155 U. S. 655) adverts to the real distinction on which the general rule and its exceptions are based, 'and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying

on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude state control over many contracts purely domestic in their nature.'

"The imposition of this tax falls within the distinction stated. These labor contracts were not in themselves subjects of traffic between the States, nor was the business of hiring laborers so immediately connected with interstate transportation or interstate traffic that it could be correctly said that those who followed it were engaged in interstate commerce, or that the tax on that occupation constituted a burden on such commerce."

Williams v. Fears, 179 U. S., 270-278.

We respectfully submit, therefore, that the judgment of the appellate court of Tennessee was proper, and that the same should be here affirmed.

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